80-772

Supreme Court, U. S.
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No. 80-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ENVIRONMENTAL DEFENSE FUND, INC.
Petitioner,

v.

DOUGLAS M. COSTLE, ADMINISTRATOR
ENVIRONMENTAL PROTECTION AGENCY
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Section 6(b)(1) of the Federal Insecticide, Fungicide and Rodenticide Act provides that any "person adversely affected" by an Environmental Protection Agency notice to change or cancel the registration of a hazardous pesticide has the right to object and to participate in an administrative hearing on his objections.

(1) Does the term "person adversely affected" as used in the statute grant rights *only* to persons whose economic interests are affected and deprive all other persons adversely affected of the right to request a hearing?

(2) Is the relief available to "persons adversely affected" who participate in § 6(b)(1) hearings limited only to less restrictive measures than those proposed by the Administrator if these persons prevail in establishing Agency error?

THE PARTIES IN THE COURT OF APPEALS

1. Petitioner is the Environmental Defense Fund, Inc., a private, non-profit national membership organization with offices in Washington, D.C.; New York, New York; Denver, Colorado; and Berkeley, California. It has a membership of more than 45,000 persons nationwide dedicated to finding scientifically sound solutions to the nation's environmental problems.

2. Respondent is Douglas M. Costle, Administrator of the Environmental Protection Agency, an independent federal government agency which regulates the use of hazardous pesticides under the provisions of the Federal Insecticide, Fungicide, and Rodenticide Act.

3. Ciba-Geigy Corporation, a registrant and the primary manufacture of chlorobenzilate, was an intervenor in the Court of Appeals.

4. This case was consolidated in the Court of Appeals with *Florida Citrus Mutual v. Costle*, No. 79-2133. The Petitioner in that case, Florida Citrus Mutual, is not a party to, and has no interest in, this Petition.

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OPINIONS BELOW

The opinion of the Court of Appeals (see Appendix A) and of the Administrator (see Appendix B) are not reported in any official or unofficial report.

STATEMENT OF JURISDICTION

The judgment of a panel of the Court of Appeals for the District of Columbia Circuit was entered on July 17, 1980. Petitioner filed a timely petition for rehearing which was denied by the Court of Appeals on August 18, 1980. This petition for a writ of certiorari was filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1)(1976).

STATUTORY PROVISIONS INVOLVED

1. Section 6(b) of the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136(b)(1976):

> (b) Cancellation and change in classification. If it appears to the Administrator that a pesticide or its labeling or other material required to be submitted does not comply with the provisions of this subchapter or, when used in accordance with widespread and commonly recognized practice, generally causes unreasonable adverse effects on the environment, the Administrator may issue a notice of his intent either—
>
> (1) to cancel its registration or to change its classification together with the reasons (including the factual basis) for his action, or
>
> (2) to hold a hearing to determine whether or not its registration should be canceled or its classification changed. . . .
>
> The proposed action shall become final and effective at the end of 30 days from receipt by the registrant, or publication, of a notice issued under paragraph (1), whichever occurs later, unless within that time either (i) the registrant makes the necessary corrections, if possible, or (ii) a request for a hearing is made by a person adversely affected by the notice. . . .
>
> In taking any final action under this subsection, the Administrator shall consider restricting a pesticide's use or uses as an alternative to cancellation and shall fully explain the reasons for these restrictions, and shall include among those factors to be taken into account the impact of such final action on production and prices of

> agricultural commodities, retail food prices, and otherwise on the agricultural economy, and he shall publish in the Federal Register an analysis of such impact.

2. Section 2(bb) of the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136(bb):

> Unreasonable adverse effects on the environment.—The term "unreasonable adverse effects on the environment" means any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide.

STATEMENT OF THE CASE

In 1972 Congress amended the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") to guarantee a hearing to persons "adversely affected" by a notice of the Administrator of the Environmental Protection Agency ("EPA") which proposes modifications in the conditions governing use of a dangerous pesticide. FIFRA is the basic statute by which use of hazardous pesticides is controlled so that the public and the environment are protected from the indiscriminate use of toxic substances. Some pesticides have been found to be so dangerous that the provisions of FIFRA have required the Administrator to impose a total ban on their use. In other cases the Administrator has imposed restrictions on the ways a pesticide may be used or applied in order to reduce health and environmental hazards to acceptable levels.

Prior to the 1972 amendments, a decision by the Administrator to change the classification of a dangerous pesticide by imposing additional restrictions on its use could be challenged at the Agency level only by the manufacturer of the pesticide. 7 U.S.C. § 135 (1947). In

1972, Congress revised § 6(b) of FIFRA and extended the right to challenge such proposals to all persons adversely affected by the terms of the Administrator's decision. 7 U.S.C. § 136d(b)(1976).

On February 13, 1979, the Administrator concluded a review of the pesticide chlorobenzilate which had been initiated in 1976 under EPA's Rebuttable Presumption Against Registration ("RPAR") procedures. As suggested by its name, an RPAR evaluation begins only when there is known to be a relatively high degree of potential harm associated with the *continued use of a currently registered* pesticide. At the conclusion of the chlorobenzilate RPAR proceeding, the Administrator issued a notice pursuant to § 6(b)(1) of FIFRA announcing that continued use of chlorobenzilate under the existing registration would cause "unreasonable adverse effects on the environment."[1] Nevertheless, because he recognized that chlorobenzilate is effective in the control of rust mite in citrus groves (its major application), the Administrator announced his determination to permit the continuation of this use subject to certain additional restrictions. The FIFRA § 6(b)(1) notice stated that these new restrictions were adequate to offset the higher level of hazards which had been discovered during the chlorobenzilate RPAR proceeding.

The Environmental Defense Fund ("EDF") filed a timely challenge to the Administrator's proposal, contending that the safeguards proposed were insufficient to protect workers and the public from the serious hazards that had become apparent during the RPAR. EDF on numerous occasions has represented the interests of occupationally exposed farmworkers in EPA proceedings.

[1] This is the statutory standard requiring cancellation or modification of the registration of a pesticide. 7 U.S.C. § 136(bb)(1976).

EDF requested an administrative hearing on its objections under FIFRA § 6(b)(1). Section 6(b)(1) provides, in pertinent part, that a notice issued under § 6(b)(1):

> ... shall be sent to the registrant and made public. The proposed action shall become final and effective ... unless ... a request for a hearing is made by a person adversely affected *by the notice*. (Emphasis supplied.)

In its objections EDF requested that continued use of chlorobenzilate in citrus groves be limited to a five-year period. EDF was aware that safer alternatives to chlorobenzilate were being developed, and contended that a five-year phase out would promote development of these substitutes. The unlimited continuation of the chlorobenzilate registration proposed by the Administrator, on the other hand, probably would result in the elimination of such expensive research and development programs. In addition, EDF expressed concern about evidence of testicular atrophy in farmworkers applying chlorobenzilate and petitioned the Administrator to require growers to provide regular health screening for these workers to protect them against impotency.

EDF pointed out that studies during the RPAR proceeding had identified chlorobenzilate as a probable carcinogen. This is significant because chlorobenzilate is applied through aerial application, raising the possibility that it will drift from the citrus groves to nearby residential areas. Another danger associated with its use is that pulp and rinds from citrus fruit which may be contaminated with chlorobenzilate are fed to dairy cattle, and thus chlorobenzilate may be contained in cow's milk and thereby enter the human food chain.

On August 23, 1979, the Administrator of the EPA entered a Final Decision which denied EDF a § 6(b)(1) hearing and which dismissed EDF's objections to the

chlorobenzilate cancellation notice.[2] The reason for the Administrator's dismissal of EDF was his conclusion that neither EDF nor any other petitioner objecting on behalf of persons exposed to the pesticide could be a "person adversely affected" within the meaning of FIFRA § 6(b)(1) because that term was intended to include only those with *economic* interests affected by additional restrictions i.e., registrants and users.[3] Appendix B, at 12b. In addition, the Administrator ruled that even if he granted EDF a hearing under § 6(b)(1), and EDF were to demonstrate the inadequacy of the safeguards during the hearing process, he would be unable to impose any safeguards more stringent than those proposed in the original notice. Appendix B, at 30b.

EDF appealed to the United States Court of Appeals for the District of Columbia Circuit[4] and, on July 17, 1980,

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[2] Notice of Intent to Cancel Registrations and Deny Applications for Registration of Pesticide Products Containing Chlorobenzilate. 44 Fed. Reg. 9548 (1979). Although the notice was styled a cancellation, it was in fact what is known as a "conditional cancellation." That is, all uses other than citrus use were to be cancelled; citrus use could continue provided additional restrictions set forth in the notice were accepted by the registrant and no person adversely affected by their terms sought a hearing.

[3] Organizational standing is not an issue in these proceedings. EDF has not been barred from these proceedings because it is not within the zone of interest to be protected, *see Sierra Club v. Morton*, 405 U.S. 727 (1972), or for any reason other than that it has no economic interest in the use of chlorobenzilate. No party or intervenor has suggested that EDF is subject to any other disability.

[4] The Court of Appeals had jurisdiction over the appeal under 7 U.S.C. § 136n(b)(1976).

a three judge panel of that Court[5] affirmed the Administrator's decision. The reasoning employed by the Circuit Court, however, was different than that employed by the Administrator in his Final Decision.[6] The Court in effect held that a § 6(b)(1) notice was severable and that only persons who are adversely affected by the cancellation portion of the notice have a right to a hearing. As to that part of the notice which permitted continued use of a pesticide *even if subject to new and different restrictions*, the Panel held that this merely *retained* an existing use and therefore could not be the subject of a § 6(b)(1) hearing.

The Environmental Defense Fund filed a petition for rehearing *en banc* which was denied August 18, 1980.

REASONS FOR GRANTING THE WRIT

This case is of major importance. Under the Circuit Court's decision, the right to a hearing on proposed EPA safeguards affecting hazardous pesticides is denied to everyone except those parties who have an economic interest in reducing or eliminating new restrictions. In

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[5] Opinion for the Court filed by Circuit Judge Wilkey joined by Judge McGowan and Judge Davies, Senior U.S. District Judge for the District of North Dakota.

[6] The Circuit Court acknowledged that "we have some difficulty with the argument that EDF is not adversely affected by the retention portion of the notice." Appendix A, at 28a. However, it stated that it was not bound by the general rule that in dealing with a determination or judgment which an administrative agency alone is authorized to make, the Court must judge the propriety of such action solely by the grounds invoked by the Agency (contrary to one of EDF's contentions to the Court). The Court held that it was dealing solely with the question of statutory construction, an issue within its expertise and therefore was not bound to follow the route the EPA traveled in its interpretation of § 6(b). Appendix A, at 28a, n.68.

1972, when Congress expanded the right to a hearing to include all persons adversely affected, it could not have intended that persons directly exposed to toxic and carcinogenic dust, fumes and contaminated food be denied the opportunity to obtain a hearing on the need for modifications in the proposed protective measures.

It must be noted that no § 6(b)(1) notice of an intention to change the present use classification of a pesticide is issued until after the EPA already has substantial evidence that continued use under an existing registration poses unacceptable danger. The decisions below have a significance well beyond that of foreclosing EDF from obtaining a hearing on chlorobenzilate since they apply with respect to *all* pesticides. *These holdings will prevent any effective challenge to the adequacy of every future EPA plan for reducing hazards by any person directly exposed to the hazard.*[7] Basically, these rulings

[7] During the Court of Appeals proceeding, the Environmental Defense Fund was supported *amicus curiae* by the following organizations:

American Public Health Association

California Rural Legal Assistance

Concern, Inc.

Consumers Union of the United States, Inc.

Environmental Action

Friends of the Earth

The Equal Justice Foundation

The Izaak Walton League

The Migrant Legal Action Program, Inc.

The National Consumers League Society

The National Consumers League

The National Wildlife Federation

The Natural Resources Defense Council

The Oil, Chemical and Atomic Workers International Union

The Sierra Club

The Wilderness Society

(footnote continues)

mean that no matter how egregious the Administrator's failure to propose adequate restrictions and no matter how large a sector of the population is adversely affected by this failure, no hearing under § 6(b)(1) may be obtained to challenge his mistakes.

1. An Interpretation of "Persons Adversely Affected" as Restricted to Those With a Financial Interest in Continued Unrestricted Use of the Pesticide Is Inherently Flawed.

Prior to 1972, FIFRA provided that a hearing on a change in classification of a pesticide was restricted to the manufacturer-registrant of that pesticide. Thus, the public was excluded from § 6(b)(1) hearings unless and to the extent that a registrant caused a hearing to be held by filing its own objection.[8]

In 1972, Congress specifically amended § 6(b)(1) by extending the right to a hearing to all persons adversely affected *by the notice*. The notice represents a summation

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(footnote continued)

It is clear that these organizations represent a significant spectrum of associations devoted to public health, safety and welfare. Who, other than these organizations, can speak effectively for migrant farmworkers who are dependent upon the adequacy of government safety regulations to prevent illness associated with the application of toxic substances? Under the holding below, none of them is able to contest the adequacy of new safeguard proposals set forth in a § 6(b)(1) notice.

[8] As indicated in the statement of the case, the Administrator's position that proposed restrictions can be amended to reduce restrictions but not to make them more stringent makes it pointless for others to become involved in the hearing process even if a registrant makes a request for hearing. What would be gained by demonstrating in an evidentiary submission that proposed restrictions were woefully inadequate if the net result were an announcement that the Administrator was helpless to do anything to overcome the dangerous conditions he proposed to allow?

of (a) the Administrator's decision with respect to whether or not the existing registration of a pesticide should be cancelled, continued or modified, and (b) the facts on which his decision is based. In instances of a "conditional cancellation," the notice specifically states *fact* conclusions as to the adequacy of the new use restrictions which the Administrator proposes. In order to permit conditional use subject to new and different restrictions, the Administrator must find that the restrictions are sufficient to eliminate "unreasonable adverse effects on the environment." FIFRA § 6(b).

The phrase "persons adversely affected" by its very terms is not limited to the manufacturer who profits by continued production or the citrus grove owner who profits by continued restriction-free use of the pesticide. Not only is this interpretation of the statute inconsistent with the accepted meaning of the phrase "persons adversely affected," but it is inconsistent with the legislative history surrounding the 1972 amendment. This Court should be aware that EPA itself supported both of these conclusions in the early stages of this proceeding, and that the Agency simply reversed its position *in medias res*.[9]

The Administrator's dismissal of EDF's objections erroneously deprived EDF (and will deprive all others similarly situated) of a statutory *right* to a hearing.

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[9] EPA originally took the position that the legislative history required and was intended to permit workers and the affected population to obtain a § 6(b)(1) hearing because they were within the category of persons adversely affected. At that time, the Agency's contention was that even though one could participate as a person adversely affected, one could not obtain more stringent relief than that set forth in the § 6(b)(1) notice. Midway through these proceedings, the EPA reversed its reading of the legislative history and now claims that Congress never intended to include farmworkers, the affected population or organizations supporting them. See Appendix A at 23a, n.56.

2. The Reasoning of the Court of Appeals in Affirming the Final Decision of the EPA Is Insupportable.

As noted, although the Court of Appeals affirmed the Final Decision of the Administrator, it appears to have disavowed the Administrator's rationale. The Circuit Court did not accept the argument that EDF was not adversely affected by the retention portion of the cancellation notice. Instead, the Court concluded that even if EDF were adversely affected by the retention decision, it would have no right to a hearing because the statute gives a hearing only to persons adversely affected by the cancellation portion of the notice. The Court's conclusion is flawed in two respects. First, it ignores the plain meaning of the statutory language. Second, it equates the conditional cancellation notice with "retention" of an existing pesticide registration.

Section 6(b) grants hearing rights to those persons "adversely affected by the notice" of cancellation. The Court's failure to interpret the statute *as it is written* is vividly demonstrated by its framing of the issue:

> . . . we do not reach the issue of whether EDF is adversely affected by the notice, because we conclude that no hearing right is available to challenge only the retention or permissive portion of a cancellation notice. Appendix A, at 28a.

The Court therefore refused to reach the question expressly posed by the statutory language; that is, whether EDF was "adversely affected by the notice." Instead, it imposed a qualification on § 6(b) that is nowhere found in the provision itself. The statute was read by the Court as if it stated that "persons adversely affected by the imposition of greater restrictions in the notice" receive a hearing as a matter of right. This is *not* what the provision says. By granting such rights to those "adversely affected by the notice," the statute permits hearings on all the

factual conclusions announced in the notice, including the conclusion that the proposed restrictions are sufficient to protect the environment.[10] The error is particularly egregious in this case because, as the Court admitted, the legislative history of the 1972 FIFRA amendment suggests that Congress intended to guarantee *greater* citizen participation in the administrative process (see Appendix A, at 32a, n.75.), a result precluded by the Court's limitation of hearing rights to persons adversely affected by the cancellation portion of the notice.

The Court also erred in treating the conditional cancellation notice as if it were simply a decision by EPA to retain an existing registration. It reasoned that since other portions of FIFRA give no hearing rights to contest decisions to permit the continued use of a pesticide (e.g., to grant a registration or to refuse to cancel a registration), EDF has no right to contest the portion of the cancellation notice which permits continued use of chlorobenzilate, although with restrictions.

In fact, there is one paramount distinction between a conditional cancellation notice and the "retention" decisions to which the Court refers. The conditional cancellation notice issues only after the Administrator has found that the pesticide causes "unreasonable adverse effects on the environment." Decisions to grant registration, or to refuse to cancel a registration, are made precisely because the Administrator has found the *absence* of such adverse effects. The availability of hearings to contest the Agency's factual findings is thus tied to the degree of

[10] It is precisely to avoid the arbitrary judicial redrafting of statutes engaged in by the Court of Appeals that this Court has recognized the primacy of the plain meaning of statutory language as a tool of legislative interpretation. *TVA v. Hill*, 437 U.S. 153, 184, n.29 (1978); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 201 (1976).

danger posed by the pesticide. If the hazards are sufficiently high to constitute "unreasonable adverse effects," the statute recognizes the wisdom of permitting hearings to test the adequacy of the Agency's proposals to reduce those hazards. The intent of the statute is to give *all* adversely affected persons the right to contest those Agency decisions which merely restrict, but do not eliminate, the use of pesticides which the Agency itself believes are dangerous.[11] This statutory meaning is entirely lost in the Court's mistaken equation of conditional cancellation notices with "retention" decisions. In this case, the chlorobenzilate registration was materially altered by the Agency's notice and therefore cannot be treated as retention of a registration.

Since the effect of the Court of Appeals' reasoning is to deny any opportunity to challenge safety conclusions set forth in *any* § 6(b)(1) notice, this Court should reexamine the Court's conclusions on a priority basis.

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[11] The necessity for hearing rights is particularly critical in this case because the Agency decided to unconditionally cancel only about 10% of the uses of chlorobenzilate after finding that the pesticide is an environmental poison.

CONCLUSION

For the reasons set forth above, petitioner respectfully requests that this petition be granted.

Respectfully submitted,

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APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1971

ENVIRONMENTAL DEFENSE FUND, INC., PETITIONER

v.

DOUGLAS M. COSTLE, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

CIBA-GEIGY CORPORATION, INTERVENOR

No. 79-2133

FLORIDA CITRUS MUTUAL, PETITIONER

v.

DOUGLAS M. COSTLE, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

Petitions for Review of Orders of the
Environmental Protection Agency

Argued 15 April 1980
Decided 17 July 1980

Judgment entered this date

Douglas V. Rigler with whom *Michael Fischer, William A. Butler* and *Jacqueline M. Warren* were on the brief for Petitioner in No. 79-1971.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

J. Hardin Peterson, Jr., with whom *William Amory Underhill* was on the brief for Petitioner in No. 79-2133. *Monterey Campbell, II* also entered an appearance for Petitioner in No. 79-2133.

David E. Menotti, Associate General Counsel, Environmental Protection Agency, of the Bar of the Court of Appeals of New York, Pro hac vice by Special Leave of Court, with whom *Michael S. Winer*, Deputy Associate General Counsel, *Mitchell H. Bernstein*, General Attorney, Environmental Protection Agency were on the brief for Respondent.

Lawrence S. Ebner with whom *Charles A. O'Connor, III* and *Robert A. Anthony* were on the brief for Intervenor Ciba-Geigy Corporation in No. 79-1971 and Amicus Curiae National Agri Chemicals Association urging reversal in Nos. 79-1971 and 79-2133.

Thomas O. McGarity was on the brief for Amicus Curiae, American Public Health Association, *et al.* urging reversal and remand in Nos. 19-1971 and 79-2133.

Before: McGOWAN and WILKEY, *Circuit Judges* and RONALD N. DAVIES *, *Senior United States District Judge* for the District of North Dakota

Opinion for the Court filed by *Circuit Judge* WILKEY.

WILKEY, *Circuit Judge*: Petitioners Environmental Defense Fund, Inc. (EDF) and Florida Citrus Mutual (Florida Citrus) challenge the Environmental Protection Agency's (EPA) refusal to hold an administrative hearing regarding an order restricting the use of chlorobenzilate in four citrus growing states and banning its use elsewhere. The EPA concluded that EDF was not a party "adversely affected" by the order, and that Florida Citrus's request for a hearing was untimely. While we do not adopt entirely the reasoning of the EPA, we affirm its decision denying the requests for an administrative hearing.

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

OUTLINE OF OPINION

I. BACKGROUND

II. JURISDICTION

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III. EDF'S RIGHT TO ADMINISTRATIVE HEARING

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IV. TIMELINESS OF FLORIDA CITRUS'S HEARING REQUEST

V. CONCLUSION

I. BACKGROUND

On 26 May 1976 the Administrator of the EPA initiated a Rebuttable Presumption Against Registration (RPAR) proceeding to determine whether unrestricted use of chlorobenzilate, a carcinogenic miticide, should continue.[1] The RPAR process is an administrative proceeding designed by the EPA to gather and evaluate information about the risks and benefits of certain pesticides. Written public participation in the preliminary notice and comment stage of RPAR process was invited.[2] The Administrator published his preliminary determinations respecting the risks and benefits of chlorobenzilate uses on 11 July 1978.[3] Pursuant to statute the Administrator referred his preliminary determination to the Secretary of Agriculture[4] and a scientific advisory panel[5] before initiating final action. An opportunity to the interested public was extended for comment on the Administrator's preliminary determinations. Both EDF and Florida Citrus, among others, submitted written comments and attended a public meeting[6] held by the scientific advisory panel.

On 13 February 1979 pursuant to section 6(b) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)[7] the EPA published a Notice of Intent to Cancel Registrations and Deny Applications for Registra-

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[1] 41 FED. REG. 21,517 (1976).

[2] *See* 40 C.F.R. § 162.11 (1978).

[3] 43 FED. REG. 29,824 (1978).

[4] 7 U.S.C. § 136(b) (1976).

[5] 7 U.S.C. § 136(d) (1976).

[6] *See* 43 FED. REG. 32,185 (1978).

[7] 7 U.S.C. § 136d(b) (1976).

tion of Pesticide Products Containing Chlorobenzilate.[8] The notice communicated the EPA's intention to restrict the use of chlorobenzilate in four citrus-growing states and to ban its use elsewhere. Both EDF and Florida Citrus requested section 6(d) administrative hearings and filed objections to the intended cancellation, the former because its provisions were too lenient, the latter because its provisions were too stringent. Florida Citrus's request, however, was not received by the EPA until 20 March 1979, more than 30 days after publication of the notice in the *Federal Register*.

On 11 April 1979 the ALJ assigned to the case issued a show cause order why an accelerated decision should not be issued against EDF and Florida Citrus.[9] On 22 May 1979 the ALJ issued an accelerated decision, in which he dismissed Florida Citrus's objections as not timely.[10] He also ruled against EDF, based on the recent administrative decision. *In re Shell Oil*, which held that no party has a right to seek more stringent relief than that proposed in a section 6(b)(1) notice. The parties appealed administratively; the Administrator issued a Final Decision on 20 August 1979, affirming the ALJ's decision on all grounds. The Administrator agreed that Florida Citrus had not filed within the time limits set out by FIFRA. He also concluded that EDF was not a party "adversely affected" by the cancellation notice, and therefore was not entitled to request an administrative hearing.[11]

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[8] 44 FED. REG. 9548 (1979).

[10] *In re Environmental Defense Fund*, FIFRA Docket No. 411 *et al.* (11 Apr. 1979), *reprinted in* Joint Appendix (J.A.) at 113-15.

[10] *In re Environmental Defense Fund*, FIFRA Docket No. 411 *et al.*, slip op. at 7-11 (22 May 1979), *reprinted in* J.A. at 72, 78-82.

[11] *Id.* at 1-7, *reprinted in* J.A. at 72-78.

On 18 December 1979 intervenor Ciba-Geigy Corp. filed a motion to dismiss on the basis that jurisdiction to review the challenged order lay in the district court and not in the court of appeals.[12] This court denied the motion on 19 February 1980.[13]

II. JURISDICTION

Intervenor Ciba-Geigy argues that the petitions for review should be dismissed on the ground that this court lacks jurisdiction to review the action of the Administrator under the judicial review provisions of section 16 of FIFRA. That section provides:

> (a) *District court review*—Except as is otherwise provided in this subchapter, Agency refusals to cancel or suspend registrations or change classifications not following a hearing and other final Agency actions not committed to Agency discretion by law are judicially reviewable in the district courts.
>
> (b) *Review by court of appeals*—In the case of *actual controversy* as to the validity of any *order* issued by the Administrator following a *public hearing*, any person who will be *adversely affected* by such order and who had been a party to the proceedings may obtain judicial review by filing in the United States court of appeals for the circuit wherein such person resides or has a place of business, within 60 days after the entry of such order, a petition praying that the order be set aside in whole or in part.[14]

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[12] Motions to Dismiss and for Separate Argument.

[13] *Environmental Defense Fund, Inc.* v. *Costle*, Nos. 79-1971, 79-2133 (19 Feb. 1980). The panel consisted of Chief Judge Wright, Senior Judge Bazelon, and Judge Wilkey. Judge Wilkey did not participate in the order.

[14] 7 U.S.C. § 136n (a)-(b) (1976) (emphasis added).

Because an "actual controversy" surrounds the Administrator's action and both petitioners claim to be "adversely affected" by the action, this court has jurisdiction if the EPA action is an "order issued by the Administrator following a public hearing."

In asserting that this court lacks jurisdiction, Ciba-Geigy argues that the proceedings before the Chief Administrative Law Judge and before the Administrator did not constitute a "public hearing" within the meaning of section 16(b) of FIFRA. Instead, those proceedings *denied* the parties the right to a formal section 6(d) hearing later. In other words, it is asserted that what we have had is not a "hearing" or "public hearing," but a "proceeding" to determine if there will be a "public hearing." In addition, Ciba-Geigy asserts that the Administrator's action was not an "order" within the meaning of section 16(b). Because EDF and Florida Citrus are not challenging an "order . . . following a public hearing," Ciba-Geigy argues, the court of appeals lacks jurisdiction. The final decision should therefore be reviewed in the district court under the section 16(a) prescription for district court review of "other final Agency actions not committed to Agency discretion by law.

In response, EDF, Florida Citrus, and the EPA argue that review in this Court is proper. They assert that the final decision is an "order," and that the record compiled through the proceedings before both the ALJ and the Administrator is sufficient to fit within the requirements of a "public hearing." In sum, while Ciba-Geigy argues that the only agency action was summary *denial* of the public hearing prescribed by section 6(d) of FIFRA, the other parties insist that the decision to deny the 6(d) hearing *was itself* based on a "public hearing" before the agency.

Thus, the jurisdiction of this Court to review the agency action at issue here turns both on whether the

final decision was an "order" and on whether that action followed a "public hearing" within the meaning of section 16 of FIFRA. The meaning of those terms within the context of the judicial review provisions of FIFRA is a question of first impression for this Court.

A. *Order*

Ciba-Geigy asserts that EPA's decision is not an "order" within the meaning of section 16(b). While it concedes the decision is an order within the meaning of the Administrative Procedure Act,[15] it argues that FIFRA contemplates "that a reviewable order is to be matured, fully deliberated agency action, taken after ample opportunity for development of the factual record upon which it must be supported." Here, Ciba-Geigy maintains that no such mature, deliberated action took place; rather, the EPA's decision was "very much by way of preliminary and summary action." [16]

No authority other than the structure of section 16(b) is cited by Ciba-Geigy to show that "order" in FIFRA means anything more than an order within the meaning of the APA. Ciba-Geigy's argument seems to boil down to this: The EPA decision is not an "order" within the meaning of section 16(b) because it is not the kind of order Congress wanted appellate courts to review.

We think that, if the order followed a "public hearing," it is the type of order Congress intended appellate courts to review. We find no authority that Congress intended further to refine the meaning of "order" in section 16(b). Therefore, we turn now to the question whether the order followed a "public hearing."

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[15] 5 U.S.C. § 551(b) (1976).

[16] Motions to Dismiss and for Separate Argument 35.

B. *Public Hearing*

In considering whether the challenged order issued after a "public hearing," it is helpful to review the nature of the proceedings and submissions before the EPA. In the proceedings before the ALJ, legal memoranda were submitted by EDF, the EPA, Ciba-Geigy, and the Department of Agriculture. Although a pre-hearing conference was scheduled, none was held. Oral argument on the issues before the ALJ was requested and denied. At the conclusion of the proceedings, the ALJ issued his Accelerated Decision, and the parties filed exceptions. On appeal to the Administrator, the same parties again submitted briefs, and EDF filed a reply brief to the EPA's memorandum. The Administrator's Final Decision followed. In all, the EPA took 186 pages of argument and supporting exhibits.[17] The certified index of the record lists 68 items.

In arguing that the Administrator did not make his decision to deny the section 6(d) hearing on chlorobenzilate after a "public hearing," Ciba-Geigy points to the lack of public notice, the absence of public participation, and the lack of any type of oral presentation by the parties. Rather, Ciba-Geigy characterizes the EPA's action as a "short-lived summary proceeding to determine whether the petitioners' requests for hearing should be dismissed." [18] The other parties, who oppose Ciba-Geigy's motion, insist that a "public hearing" within the context of the FIFRA judicial review provision can be far less than a formal, evidentiary proceeding. Relying on decisions that require no such proceedings to satisfy a "hearing" requirement and on legislative history that points to the importance of a record for appellate court

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[17] *See* Response of Petitioner Environmental Defense Fund to Intervenor's Motion to Dismiss 10.

[18] Motion to Dismiss and for Separate Argument 18.

review, these parties emphasize that appellate review of the Administrator's order requires a decision only as to a matter of law and can be made on the basis of the record already compiled before the agency.

Neither FIFRA nor federal law articulates a definition of the term "public hearing." [19] In resolving the jurisdictional question, we must turn to other sources. Examination of references to public hearings in FIFRA, interpretive case law, and the meaning of analogous language in other statutes is helpful, but does not unambiguously resolve the question. However, FIFRA's legislative history and judicial policy strongly indicate that the proceedings constituted a public hearing within the meaning of section 16(b).

1. *Statutory Language*

Although FIFRA does not define "public hearing," it does use that term in several of its sections. Section 16(b) invokes appellate court review only of an "order issued . . . following a public hearing." Review is to be based on all evidence of record, and the decision of the Administrator is to be sustained if supported by substantial evidence, considered on the record as a whole.[20] Section 6(d) describes the procedures to be followed in a public hearing held pursuant to a section 6(b) request. Section 6(d) refers to the necessity of due notice, and the production of evidence, documents, and testimony.[21] Section 14(a) requires notice and opportunity for "a hearing" before civil penalties can be assessed under the Act, but does not describe the nature of the hearing.[22]

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[19] *Seacoast Anti-Pollution League* v. *Costle*, 572 F.2d 872, 879 n.14 (1st Cir. 1978).

[20] 7 U.S.C. § 136n(b) (1976).

[21] *Id.* § 136d(d).

[22] *Id.* § 136*l*(a).

Section 21(b) allows the Administrator to solicit the views of all interested persons in connection with his other authority relating to public hearings.[23] In addition, section 21(c) provides that "[i]n connection with all public hearings under this subchapter the Administrator shall publish timely notice of such hearings in the Federal Register." [24]

Ciba-Geigy urges that the combination of these provisions, especially the description of the procedures required in a section 6(d) hearing, shows that the "public hearing" needed prior to appellate review under section 16(b) of FIFRA is a formal affair with at least some opportunity for oral presentation.

While this argument has some appeal, we are not persuaded. That FIFRA establishes certain types of hearing proceedings and procedures does not definitively prove that these are the only "public hearings" able to serve as predicates of appellate court review. Furthermore, it is possible for a term to have different meanings, even in the same statute.[25] As we observed in another case

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[23] *Id.* § 136s(b).

[24] *Id.* § 136s(c).

[25] Thus the implicit partial definition of public hearing in § 21(c) does not necessarily govern its meaning in § 16(b). Section 21(c) provides: "In connection with all public hearings under this subchapter the Administrator shall publish timely notice of such hearings in the Federal Register." This implies that any proceeding in which notice is not so published is not a public hearing, and since no such notice was published in this case, arguably no public hearings preceded the order. But §§ 21(c) and 16(b) are concerned with different matters, and "public hearing" in each must be interpreted in light of those differing concerns. Section 21(c) is procedural, governing the input of agency decisions; § 16(b) is jurisdictional, focusing on the kind of decision courts of appeals should review. In interpreting § 21(c), one must inquire what kind of proceedings Congress thought

construing the meaning of "order" for judicial purposes: "[T]he word 'order' has several frequently utilized meanings which vary in scope, and it is therefore not surprising that different sections of the same statute might use the word in different ways." [26]

In the absence of an explicit or conclusive contextual definition of "public hearing" in FIFRA itself, in resolving the jurisdictional question we think it wise to consult sources that might shed light on its meaning.

2. *Case Law*

Section 16(b) has been litigated rarely, and no decision has defined precisely the term "public hearing" as it is used in that section. In *Louisiana* v. *Train*,[27] a district court in the Western District of Louisiana addressed the question of appellate court jurisdiction under section 16(b). The EPA hearing that was the focus of the case had consisted of the presentation of 93 witnesses, 1180 pages of transcript, and 1080 pages of exhibits over a period of five days. The proceeding was an informal public hearing, rather than a formal adjudicatory hearing within the meaning of section 554 of the APA. The district court recognized that section 6(d) of FIFRA contemplated formal public hearings for cases of cancellation, suspension, or refusal to register a pesticide.

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needed to be announced via the *Federal Register*. In interpeting § 16(b), one must ask what type of proceeding Congress wanted courts of appeals to review. As will be discussed, we think the agency proceedings and decision here meet the concerns motivating Congress's restriction of appellate court review to "orders . . . following a public hearing."

[26] *Investment Co. Inst.* v. *Board of Governors*, 551 F.2d 1270, 1278 (D.C. Cir. 1977).

[27] 392 F. Supp. 564 (W.D. La.), *aff'd mem.*, 514 F.2d 1070 (5th Cir. 1975).

In addition, however, the court noted that section 21(b) allows the Administrator to solicit the views of interested persons concerning actions taken under the Act. This solicitation, the court concluded, would involve informal, rather than formal, public hearings. Because these FIFRA provisions indicated that Congress had contemplated that both formal and informal proceedings were "public hearings," and because legislative history did not suggest that Congress intended "public hearing" to mean only a formal public hearing, the district court concluded that an EPA order following an informal public hearing was sufficient to trigger appellate court review under FIFRA. The Fifth Circuit affirmed without opinion.

While helping illuminate the meaning of "public hearings," *Louisiana* v. *Train* is distinguishable from the present case. The informal hearings in *Train* occurred after notice of proposed public hearings appeared in the *Federal Register*, presumably as required by section 21(c) of FIFRA.[28] Moreover, the *Train* hearings included oral presentations, examinations of witnesses, and extensive evidence.

Although *Train* does not resolve the question confronting the court, it does indicate that the term "public hearing" encompasses more than just section 6(b) hearings.

3. *Other Statutes*

Absent a definition or conclusive indications of the meaning of "public hearing" in FIFRA and interpretive case law, it is instructive to examine the meaning of similar terms in other statutes. It appears that the term "hearing" does not always require formal proceedings, or even oral presentations.

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[28] *But see* note 25 *supra*.

In *Florida East Coast Railway* [29] the Supreme Court held that, at least in some contexts, the term "hearing" should be defined by reference to the use of that term in the Administrative Procedure Act.

> [C]onfronted with a grant of substantive authority made after the Administrative Procedure Act was enacted, we think that reference to that Act, in which Congress devoted itself exclusively to questions such as the nature and scope of hearings, is a satisfactory basis for determining what is meant by the term "hearing" used in another statute. Turning to that Act, we are convinced that the term "hearing" as used therein does not necessarily embrace either the right to present evidence orally and to cross-examine opposing witnesses, or the right to present oral argument to the agency's decisionmaker.[30]

Applying this reasoning to section 1(14)(a) of the Interstate Commerce Act,[31] the Court held that the hearing requirement was satisfied by the "opportunity to comment, to object, or to make some other form of written submission." [32] Other authority supports the conclusion that a "hearing" need not require formal proceedings nor oral presentations.[33]

The absence of oral presentations in the challenged proceedings would not disqualify them from being labeled "hearings." But here we consider the meaning not just

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[29] 410 U.S. 224 (1973).

[30] *Id.* at 240 (footnote omitted).

[31] 24 Stat. 379 (1887) (current version at 49 U.S.C. § 11122 (Supp. II. 1978)).

[32] 410 U.S. at 241.

[33] *E.g., United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972); *Morgan* v. *United States*, 298 U.S. 468 (1936).

of "hearing," but of "public hearing." Ciba-Geigy asserts that "public hearing" means something more. It cites circuit court decisions that construe "public hearing" in other statutes to require oral presentation or public participation.

For example *Seacoast Anti-Pollution League* v. *Costle*[34] construed the Federal Water Pollution Control Act (FWPCA) Amendments of 1972 and the requirement of the "opportunity for a public hearing" for operators of effluent sources prior to an effluent limitation. The First Circuit stated that

> the FWPCA requires the EPA to afford an opportunity for a *public hearing*. We do not believe that an opportunity to submit documents constitutes a public hearing. Nor do we believe that the Administrator can comply with the statute merely by taking some evidence at a public hearing and then taking the rest in written form.[35]

Despite the provision of section 556(d) of the Administrative Procedure Act that allowed agency "procedures for the submission of all or part of the evidence in written form," the court found that the requirement of a public hearing meant something more than only written submissions. Other decisions have also stressed the importance of oral as well as written participation, when a public hearing is required by statute.[36]

While these opinions do indicate that "public hearing" in some statutes requires oral public participation, they

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[34] 572 F.2d 872 (1st Cir. 1978).

[35] *Id.* at 879 (emphasis in original) (footnote omitted).

[36] *E.g., South Terminal Corp.* v. *EPA*, 504 F.2d 646 (1st Cir. 1974); *Anaconda Co.* v. *Ruckelshaus*, 482 F.2d 1301 (10th Cir. 1973); *Virgin Islands Hotel Ass'n* v. *Virgin Islands Water & Power Auth.*, 465 F.2d 1272 (3d Cir. 1972).

do not control the interpretation of section 16(b). These decisions construe the meaning of the term "public hearing" in a context entirely different from that of section 16(b) of FIFRA; they consider what procedures should be followed in the process of agency decisionmaking,[37] *rather than what "public hearings" trigger appellate review.*

To determine whether a broader or narrower construction of "public hearing" should be a prerequisite to appellate review, we turn to the legislative history to examine the purpose of the requirement.

4. *Legislative History*

The present judicial review system in FIFRA dates from 1972. Prior to 1972, FIFRA had provided for appellate review in a case of actual controversy as to the validity of an EPA order.[38] No express provision prescribed district court review. In a pre-1972 decision which considered judicial review under FIFRA, this court noted that the review provisions "contemplated that judicial review would ordinarily occur . . . after advisory committee proceedings and a public hearing. But they do not make advisory committee proceedings or a public hearing a jurisdictional prerequisite to review."[39] Even the lack of a hearing record, the court thought, would not preclude review entirely.

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[37] *Compare Mobil Oil Corp.* v. *Federal Power Commission*, 483 F.2d 1238 (D.C. Cir. 1973), *with Independent Cosmetic Mfrs.* v. *HEW*, 574 F.2d 553, 560 (D.C. Cir. 1978) (Wilkey, J., dissenting). *See also* Friendly, *"Some Kind of Hearing,"* 123 U. Pa. L. Rev. 1267 (1975).

[38] *See Nor-Am Agricultural Prods., Inc.* v. *Hardin*, 435 F.2d 1151, 1156 (7th Cir. 1970).

[39] *EDF* v. *Ruckelshaus*, 439 F.2d 584, 591 (D.C. Cir. 1971) (footnote omitted).

The 1972 amendments to FIFRA established judicial review for different types of agency action in both the district and the appellate courts. In its report the Senate Committee on Agriculture and Forestry indicated that the question of judicial review was one of major concern and study. The Committee believed that it had simplified the procedures for review by providing that Agency actions taken after a hearing were to be reviewed by courts of appeals and those taken without a hearing in the district courts.[40]

The Senate report explained the appropriate division of judicial review as follows:

> After a hearing judicial review on petition by any person adversely affected is properly lodged in the *courts of appeals, since an adequate record exists for such review.* Where, however, the Administrator has determined no substantial question of safety exists which warrants formal review, and thus has refused to hold a hearing, review should be by a *district court since there is no record for the court of appeals.*[41]

In Part II of the same Senate report, the Committee quoted this language and added:

> In short, the Committee on Agriculture and Forestry believes that matters which have not been heard before should go to courts of original jurisditcion and appeals from cases which have already been administratively heard and decided should go to appellate courts. The question is really that simple.[42]

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[40] S. REP. No. 92-838, 92d Cong., 2d Sess. 28, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4019.

[41] *Id.* at 13, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4004 (emphasis added).

[42] *Id.*, pt. II, at 50-51, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4070 (emphasis added).

Ciba-Geigy argues that because the Administrator "has refused to hold a hearing," no "public hearing" has occurred to give this court jurisdiction. It is true that no hearing concerning cancellation *per se* has taken place, and we are presently without jurisdiction to review the merits of EPA's decision conditionally to cancel registration of chlorobenzilate. *But that is not the issued presented us. The question raised in this case is the legality of denying a section 6(d) hearing, and that issue has "already been administratively heard and decided."* [43]

Furthermore, the Committee's considerable emphasis on the existence of a reviewable record must be considered in reaching a conclusion as to our jurisdiction. The Committee reasoned that appellate review was appropriate after a hearing because *"an adequate record exists for such review."* [44] Legislative developments subsequent to the 1972 amendments [45] are also consistent with the proposition that the availability of a record is especially significant in appellate review. During consideration of the 1975 FIFRA amendments, the National Agricultural Chemicals Association attempted to restrict the judicial review provisions to orders following a public hearing "pursuant to Section 6 of this Act." That change was deleted in Senate floor debate.[46] The Senate's sub-

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[43] *Id.*

[44] *Id.*, pt. I, at 13, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4004.

[45] Although the subsequent history is not as persuasive as statements contemporaneous with the statute's enactment, it is entitled to "some weight 'as a secondarily authoritative express of expert opinion.'" *Copeland* v. *Martinez*, 603 F.2d 981, 988 (D.C. Cir. 1979), *cert. den.*, 100 S.Ct. 730 (1980) (quoting *Parker* v. *Califano*, 561 F.2d 320, 339 (D.C. Cir. 1977) (quoting *Bobsee Corp.* v. *United States*, 411 F.2d 231, 237 n.18 (5th Cir. 1969)).

[46] 121 CONG. REC. 36,116 (1975).

stitution, "for which there is a reviewable record," was also deleted during conference. Section 16(b) remained unchanged. The conference report, however, made it clear that the availability of a reviewable record was the basis for appellate review:

> It is the intent of the Conferees, however, that an adequate reviewable record be developed by the Environmental Protection Agency in each of its public hearings although such hearings need not necessarily be adjudicatory in nature.[47]

In 1977 the National Agricultural Chemicals Association proposed that any order to be given appellate review be based on the record of a formal or due process hearing. The Association was responding to the Administrator's position that an order following any type of public hearing was to receive appellate review. The Senate rejected the proposal, and the report notes:

> The Subcommittee then took up the proposal of the National Agricultural Chemicals Association that would require that all Environmental Protection Agency public hearings directly reviewable in the courts of appeal be adjudicatory in nature. It was decided that there was no compelling reason for changing existing law and the proposal was not adopted.[48]

The legislative history of the 1972 amendment, then, demonstrates that *underlying the restriction of appellate review to orders following public hearings was congressional concern that review be based on an administrative decision with an adequate record.* The history of subsequent attempts to amend FIFRA shows no lessening of these concerns.

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[47] H.R. REP. No. 94-668, 94th Cong., 1st Sess. 6 (1975).

[48] S. REP. No. 95-334, 95th Cong., 1st Sess. 12 (1977).

Here, no facts are at issue. The petition presents a pure question of law. The submissions before the Agency and its decisions constitute a completely adequate record for us to review. This being the case, we conclude that the proceedings before the agency sufficiently meet the concerns of Congress animating section 16(b) to qualify as a public hearing.

5. *Judicial Policy*

It should be noted that our conclusion that these proceedings constituted the kind of public hearing Congress intended to trigger appellate review is in accord with sound judicial policy. In determining when agency regulations are a "final order" allowing appellate court jurisdiction, this court has stated, "[i]t is the availability of a record for review and not the holding of a quasi judicial hearing which is now the jurisdictional touchstone." [49] Also, where "the administrative record forms the basis for review, requiring petitioners challenging regulations to go first to the district court results in unnecessary delay and expense . . . and undesirable bifurcation of the reviewing function between the district courts and the courts of appeals." [50] Where administrative proceedings have developed an adequate record, judicial policy favors appellate review; where no record or an insufficient record is developed, district court review is generally appropriate.

In this case, not only does *a* record exist, but it is "an adequate record . . . for such review." [51] The agency

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[49] *Deutsche Lufthansa Aktiengesellschaft* v. *CAB*, 479 F.2d 912, 916 (D.C. Cir. 1973).

[50] *Investment Co. Inst.* v. *Board of Governors*, 551 F.2d 1270, 1276 (D.C. Cir. 1977) (citations omitted).

[51] S. REP. No. 92-838, 92d Cong., 2d Sess. 13, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 4004; *see Independent Cosmetic Mfrs.* v. *HEW*, 574 F.2d at 576 (Wilkey, J., dissenting).

action in refusing to hold section 6(d) hearings at the request of both EDF and Florida Citrus raised issues of law; those issues were briefed by the parties, and considered by the Agency. An order expressing Agency rationale resulted. It would seem that few, if any, further insights could have been gained through further proceedings. Moreover, no fact finding will be necessary in the process of judicial review. Appellate court review on the basis of this sufficient record is consistent with judicial policy. Involving a district court first not only would not necessarily benefit the parties, but in view of the likelihood of appeal might well be a waste of time and effort by the court and parties.

We recognize that Congress may allocate judicial review responsibilities as it pleases, with or without regard to consideration of judicial economy or policy.[52] Here, fortunately, Congress designed review provisions with the jurisdictional touchstone of the reviewable record in mind. Referring to the existence of an adequate record in deciding if an order followed a public hearing within the meaning of section 16(b) is consistent with the legislative history and judicial policy.

Because the record before us is wholly adequate for judicial review, we conclude the proceedings antecedent to the Administrator's order were a "public hearing" granting this court jurisdiction to review the challenged order.

III. EDF's Right to Administrative Hearing

EDF maintains that it was entitled to an administrative hearing pursuant to section 6(b) because it was a

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[52] *Harrison* v. *PPG Indus., Inc.*, 48 U.S.L.W. 4585, 4589 (U.S. 27 May 1980) (No. 78-1918); *see Independent Cosmetic Mfrs.* v. *HEW*, 574 F.2d at 568 (Wilkey, J., dissenting).

person adversely affected by the notice. Section 6(b) provides in pertinent part:

> The proposed action shall become final and effective at the end of 30 days from receipt by the registrant, or publication, of a notice issued under paragraph (1) whichever occurs later, unless within the time . . . (ii) a request for a hearing is made by a person adversely affected by the notice.[53]

The EPA contends that EDF is not adversely affected within the meaning of section 6(b), and that its remedy is district court review of the decision to retain pursuant to section 16(a). In relevant part that section states: "Agency refusals to cancel . . . registrations . . . not following a hearing . . . are judicially reviewable in the district courts." [54]

We hold that to the extent the notice *cancels* uses of chlorobenzilate, EDF is not adversely affected. To the extent EDF challenges the *retention* of registration as restricted, it is not entitled to an administrative hearing.

A. *Cancellation*

EDF filed objections to the Administrator's notice in order to challenge "continued use of chlorobenzilate in citrus groves." [55] It is thus the retention, *not* the cancel-

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[53] 7 U.S.C. § 136d(b) (1976).

[54] *Id.* § 136n(a).

[55] Brief for Petitioner EDF at 6. Specifically EDF objected to:

a) the Agency's assessment of both the risks and benefits of the use of chlorobenzilate on citrus;

b) the Agency's determination that modifications in the terms or conditions of registration of products containing chlorobenzilate for use on citrus will reduce

lation aspect of the notice, that EDF maintains adversely affected it. As a matter of fact, because no objections were filed in a timely manner to the cancellation aspects of the notice, EDF maintains that that aspect of the notice should go into effect immediately. Because EDF was not adversely affected by cancellation and restrictions of chlorobenzilate uses, as to that portion of the notice EDF clearly neither has nor claims a right to a hearing.

B. *Noncancellation*

1. *Agency Rationales and Appellate Arguments*

The rationales used by the EPA throughout these proceedings to deny EDF an administrative hearing have not been entirely consistent.[56] First, the ALJ ruled

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risks sufficiently to eliminate any unreasonable adverse effects on man or the environment;

c) the Agency's failure to cancel citrus uses of chlorobenzilate products after a limited phase-out period during which alternatives can be registered; and

d) the Agency's failure to require the examination of sperm counts in a selected population of chlorobenzilate applicators and citrus pickers exposed to chlorobenzilate to gather data on the potential adverse effects of chlorobenzilate on human reproduction.

Request for Hearing and Objections of the Environmental Defense Fund to the Notice of Intent to Cancel Registrations of Chlorobenzilate at 2-3, *reprinted in* J.A. at 147-48.

[56] Interestingly EPA counsel originally argued rather strenuously to the ALJ that EDF could be adversely affected by a retention decision within the meaning of § 6(b). Respondent's Reply to Memorandum of Petitioner Environmental Defense Fund in Response to Notice to Show Cause of 11 April 1979, at 6-10, *reprinted in* J.A. at 88-92. Agency counsel changed its position in argument before the Administrator, contending that only those desiring to stop cancellation can be "adversely affected" within the meaning of § 6(b). Respondent's Reply to Exceptions and Appeal by Environmental Defense Fund from Accelerated Decision at 4, *reprinted in* J.A. at 45.

that to consider in the cancellation proceedings restrictions on the use of chlorobenzilate greater than those proposed in the cancellation notice would be improper. He relied on *In re Shell Oil Co.*,[57] a decision by the Judicial Officer of the EPA issued 9 April 1979 which prohibited consideration in a section 6(b)(1) proceeding of contentions that a conditional cancellation is insufficiently restrictive. EDF did not challenge the applicability of *Shell*, but argued that it had been wrongly decided. The ALJ considered himself bound by *stare decisis*. Although he *assumed* that EDF *was* adversely affected by the notice,[58] he held that its objections were outside the scope of the cancellation proceeding, and he denied the hearing request.[59]

Then, while *affirming* the decision of the ALJ "in its entirety," [60] the Administrator's opinion focused on the proposition that EDF was *not* a party "adversely affected" by the notice of cancellation. The Administrator maintained that EDF was an "adversely affected" party under section 16(a) of FIFRA, but not under section 6(b). In his view, "adversely affected" persons within the meaning of section 6(b) principally meant registrants and users.[61] Finding no indications that Congress meant

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[57] FIFRA Docket No. 401 *et al.* (9 Apr. 1979), *reprinted in* J.A. at 116-35.

[58] *In re Environmental Defense Fund*, FIFRA Docket No. 411 *et al.*, slip op. at 4 n.4 (22 May 1979), *reprinted in* J.A. at 75 n.4.

[59] *Id.* at 4-5, *reprinted in* J.A. at 75-76.

[60] *In re Environmental Defense Fund*, FIFRA Docket No. 411 *et al.*, slip op. at 39 (23 Aug. 1979), *reprinted in* J.A. at 39.

[61] He cited legislative history indicating that users of pesticides were the prime movers behind 1972 amendments allowing "persons adversely affected by the notice" to request an administrative hearing instead of just "registrants" of the

to include within the category of those who could request section 6(b)(1) hearings anyone besides parties adversely affected by *cancellation* of registration, the Administrator concluded that parties affected only by the failure to restrict pesticides more stringently were not entitled to request a hearing. Having thus determined that EDF was *not* an adversely affected party,[62] the Administrator largely ignored[63] the *Shell* Oil arguments.[64]

In its appellate brief the EPA has further refined its argument. Although not eschewing the Administrator's rationale, the EPA now suggests that under the 1972 Amendments no person could ever be adversely affected by an insufficient notice of cancellation.[65] The 1972

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pesticide. The Administrator cited language in the legislative history and a Fifth Circuit opinion demonstrating that the amendment was to allow users to request hearings.

[62] *In re Environmental Defense Fund*, FIFRA Docket No. 411 *et al.*, slip op. at 10 (23 Aug. 1979), *reprinted in* J.A. at 17.

[63] The Administrator did deal briefly with EDF's argument that any EPA authority to enlarge the scope of relief in a section 6(b)(1) hearing beyond that proposed in the notice would not pose due process problems. *Id.* at 27, *reprinted in* J.A. at 33.

[64] On appeal EPA maintains that we need not reach the *Shell* issue respecting the proper scope of § 6(b)(1) proceedings. Brief for Respondent at 45-48. Because we conclude the request for a hearing was properly denied, we do not decide what issues are appropriate at a properly initiated hearing.

[65] It notes that prior to 1972 the Administrator had virtually no option conditionally to cancel registrations; if he found that there was a substantial question as to the safety of the pesticide, he was obligated to issue a notice of *unconditional* cancellation. No person could be adversely affected by the retention part of a notice because all cancellation notices

amendments extended the right to initiate hearings to those adversely affected by cancellation, but not to those who claim injury because a notice failed to announce *unconditional* restrictions (*i.e.*, sufficient restrictions) upon the use of the pesticide. The EPA contends, however, that the 1972 amendments granted it no authority to issue contingent notices at all; therefore, the amendments may not be construed to extend hearing rights as suggested by EDF. According to the EPA, it was not until 1975 that Congress tacitly allowed it to issue *conditional* cancellation notices by changing the standard from a "substantial question of safety" determination to a *balancing* of economic, social, and environmental factors. EPA would ascribe no intent to Congress to change at that time the category of persons permitted to request hearings.

Thus, only those injured by the PROHIBITORY *aspect of a notice's cancellation or restriction provisions may request a hearing. EDF, on the other hand, claims injury only from the* PERMISSIVE *aspect of the notice.* The permissive aspect is really only a preservation of the status quo, or a part of the status quo. The Agency maintains that a failure to take more restrictive action

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were unconditional. *After* a section 6(b) hearing, the Administrator could issue an order that partially or conditionally cancelled pesticide registrations, but not before. The EPA argues that in enacting the 1972 amendments Congress intended that the "substantial question" standard for issuing cancellation notices continue, and therefore all cancellation notices were to be unconditional. Brief for Respondent at 29-30 note * (quoting S. REP. No. 92-838, 92d Cong., 2d Sess. 12-13 (1972) and 40 FED. REG. 28255 (1975). *See also* H. Rep. No. 92-1540, 92d Cong., 2d Sess. 32 (1972) ("[the amended FIFRA] preserves cancellation criteria in existing law"). Its still being the case that no person could be adversely affected by the failure of a notice to go far enough, Congress could not have intended that such entities be among those adversely affected parties that may request administrative hearings.

in a notice (*i.e.*, retaining the status quo in part by permitting certain qualified uses) does not injure a party in the way Congress intended when it granted "adversely affected" parties the right to request administrative hearings.[66]

Ciba-Geigy notes that EDF is challenging only the decision to retain the pesticide registration subject to certain conditions. It maintains that the structure of FIFRA makes clear that while adversely affected parties have a right to a hearing as to *cancellation* decisions by the EPA, they have no right to challenge in an administrative hearing *retention* decisions by the Agency.

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[66] EDF on the other hand argues that "adversely affected" means the same thing in section 6(b) as it does in section 16(a). It maintains that in the absence of contrary evidence the words should be interpreted the same way. It notes that the 1972 amendments instructed the Administrator to issue cancellation notices whenever it found that continued use of pesticide would result in "*unreasonable* adverse effects on the environment," Federal Environmental Pesticide Control Act of 1972, § 6(b), Pub. L. No. 92-516, 86 Stat. 973 (codified at 7 U.S.C. § 136d(b) (1976)), that phrase defined as "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide." *Id.* § 2(bb) (current version at 7 U.S.C. § 136(bb)).

EDF argues that whatever the standard for *when* cancellation notices should issue under the 1972 amendments, nothing prevented the EPA from issuing conditional cancellation notices. The Judicial Officer in *Shell Oil* appeared to acknowledge the power of the EPA under the 1972 amendments to issue conditional cancellation notices. Slip op. at 12, *reprinted in* J.A. at 127 ("the 1972 amendments provided ample authority for the Agency to consider restrictions on the use of a pesticide as an alternative to cancellation"). EDF also notes that the 1972 amendments to FIFRA were in part motivated by concern that citizens participate in the regulatory process, and therefore "adversely affected" parties under section 6(b) should include those impacted by insufficient restrictions in a notice.

2. *Discussion*

We have some difficulty with the argument that EDF is not adversely affected by the retention portion of the notice. The EPA's argument is intricate and dependent on congressional knowledge of implied interrelationships of stated and intended notice standards, conditional and unconditional notices, and parties affected thereby. However, we do not reach the issue of whether EDF is adversely affected by the notice, because we conclude that no hearing right is available to challenge only the retention or permissive portion of a cancellation notice.

It is true that in "dealing with a determination or judgment which an administrative agency alone is authorized to make, [the court] must judge the propriety of such action solely by the grounds invoked by the agency." [67] Here, however, we deal solely with a question of statutory construction, an issue within the court's expertise, and we are not bound to follow the route the EPA traveled in interpreting section 6(b).[68]

EDF concedes that, had the Administrator concluded that no cancellation proceedings were warranted, *its only remedy would be section 16(a) district court review under the arbitrary and capricious standard.*[69] It is clear that were chlorobenzilate already registered under the restrictions of the subject notice of cancellation, and were EPA upon reviewing the situation to conclude that no further restrictions were necessary, EDF's only remedy would be in the district court. The question here is

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[67] *SEC* v. *Chenery*, 332 U.S. 194, 196 (1947).

[68] *See* K. DAVIS, ADMINISTRATIVE LAW TEXT § 16.07, at 329 (3d Ed. 1972) (*Chenery* principle "does not apply to functions which courts properly perform, such as . . . interpreting statutes").

[69] Reply of Environmental Defense Fund to Brief of Intervenor Ciba-Geigy Corp. at 5.

very narrow: whether by being included in the notice of cancellation the decision to continue registration under certain restrictions becomes subject to an administrative hearing and eventual substantial evidence review by the court of appeals. That is, *does section 6(b) compel the EPA to hold an administrative hearing when the only proffered objection concerns the retention portion of a notice of cancellation?* We hold that it does not.

Because we conclude that EDF is not entitled to a hearing as to the retention question only, we do not find it necessary to reach the question whether a party in a validly initiated hearing could expand the scope of the proceedings to consider restrictions more stringent than those proposed by the EPA.

(a) *Structure and Language of Section 6(b)*

The language of section 6(b) speaks only in terms of cancellation decisions. The Administrator issues a "notice of his intent . . . *to cancel* [the pesticide's] registration." [70] Unless an adversely affected party requests a hearing, the *cancellation* becomes final and effective. At that time any retention portion of the notice becomes no more final than it was prior to the cancellation; a party still may petition the EPA to issue an unconditional cancellation notice and obtain district court review of any refusal to do so.[71] Thus, the request for a hearing *stops the cancellation process* and has no effect on the retention portion of the notice.[72] Since the hearing

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[70] 7 U.S.C. § 136d(b)(1) (1976) (emphasis added).

[71] *See In re Environmental Defense Fund*, FIFRA Docket No. 411 *et al.*, slip op. at 23 (23 Aug. 1979), *reprinted in* J.A. at 30; 7 U.S.C. § 135n(a) (1976).

[72] Furthermore, we believe that interpreting section 6(b) to allow a hearing request of itself negatively to affect continued registration of a pesticide would contravene sec-

halts the *cancellation* process, logically the purpose of the hearing must be evaluation of the *cancellation* proposal.

Thus, the language and structure of section 6(b) indicate that an adversely affected person may request a hearing to consider reasons why registration should not be cancelled. There is no indication that a party has a right to a hearing to consider solely objections to the retention part of the notice.

(b) *Legislative Intent*

Prior to 1972 only registrants could request hearings respecting cancellation notices. The 1972 amendments expanded the class which could request hearings, but there is no evidence that Congress intended to change the basic subject matter and purpose of section 6(b) hearings. Legislative history indicates that the class was broadened out of concern that users be allowed to challenge cancellation decisions when registrants declined to do so. As the Fifth Circuit explained in *McGill* v. *EPA*:

> The legislative history suggests that the rights of non-registrants were recognized in the statute because certain Congressmen were concerned that a pesticide producer would choose not to defend a

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tion 6(c). Section 6(c) grants the Administrator exclusive authority to suspend registrations when he believes it necessary to "prevent an imminent hazard during the time required for cancellation . . . proceedings." We decline to interpret section 6(b) to permit parties effectively to suspend a registration pending the hearing simply by filing objections and requesting a hearing.

EDF argues that the EPA could issue regulations allowing the cancellation portion of a notice to go into effect when only the retention portion is challenged. Brief for Petitioner EDF at 18. This may be true. But this does not change the fact that a hearing request is capable only of halting the cancellation process, and of itself not capable of preventing continued registration.

particular registration that was of small importance to the manufacturer, but of great importance to a particular agricultural group. All parties to this litigation agree that the testimony of Dr. Edwin A. Crosby, a representative of the National Canners Association, was instrumental in securing rights for non-registrants in the revised statute. His proposed amendment was designed to protect the rights of users of established pesticides if the producer-registrant decided not to defend against the cancellation or change of a particular registration.[73]

The proposed Crosby amendment would allow any person "adversely affected by cancellation of a registration" to file objections and request an administrative hearing.[74] As adopted by Congress, section 6(b) allows those "adversely affected by the notice" to request a hearing. While this slight change in wording may indicate an intent to broaden the category of hearing requesters, we do not think it evidences a change in the purpose of section 6(b) hearings. The reason Congress adopted the amendment was to allow persons other than registrants to compel hearings regarding the *cancellation* decision. While there is evidence that Congress desired participation in administrative proceedings by interested citi-

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[73] 593 F.2d 631, 635-36 (5th Cir. 1979) (citing *Hearings on H.R. 10729, Before the SubComm. on Agricultural Research and General Legislation of the Senate Comm. on Agriculture and Forestry*, 92d Cong., 2d Sess. 294 (1972)) (footnote omitted).

[74] In full the proposed amendment provided:

> Any person who will be adversely affected by cancellation of a registration or change of classification also may file objections and request a public hearing within 30 days of public notice of the Administrator's intention to cancel the registration or to change the classification of a pesticide.

Hearings on H.R. 10729 Before the SubComm. on Agricultural Research and General Legislation of the Senate Comm. on Agriculture and Forestry, 92d Cong., 2d Sess. 298 (1972).

zens,[75] we find no persuasive indications that Congress intended to alter the function of section 6(b) hearings from the halting of and considering of challenges to cancellation decisions to include consideration of objections that noncancellation decisions are excessively permissive. A party seeking review of the permissive aspect of the Agency decision (*i.e.*, the retention of certain erstwhile qualified uses) may challenge these notice provisions in district court.[76]

(c) *Relationship with Other Parts of FIFRA*

We note that our interpretation of section 6(b) is consistent with other aspects of FIFRA. Decisions by the Administrator to deny registration of pesticides may be challenged in an administrative hearing, but not decisions to grant registration.[77] Decisions to suspend registration pending a hearing are subject to an administrative hearing, but not decisions refusing to suspend.[78] As previously noted, decisions to cancel may be challenged in an agency hearing, but not refusals to issue a cancellation notice.

The pattern seems to be that decisions regulating more strictly may be challenged in administrative hearings, those regulating less strictly may not.[79] *Thus, persons*

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[75] For instance Senator Hart maintained that the bill took "important strides in . . . the promotion of citizen participation in the regulatory process through comment before administrative agencies." 118 CONG. REC. 32,259 (1972).

[76] *See* notes 77-79 and accompanying text *infra*.

[77] 7 U.S.C. § 136a(c)(5)-(6) (1976).

[78] *Id.* § 136d(c) (1976).

[79] The Food, Drug and Cosmetics Act, 21 U.S.C. § 355 *et seq.* (1976), appears to exhibit a similar pattern. 21 U.S.C. § 355(c)(1)-(2) (1976) (hearing when drug application rejected, no hearing when approved).

seeking more stringent regulation may sue in the district court without first enduring an administrative hearing; those complaining of regulation as too strict must first exhaust their administrative remedy of a formal hearing before seeking judicial review. While all the provisions of FIFRA may not fit precisely into this mold, we think this apparent pattern is useful to keep in mind. Interpreting section 6(b) to require hearings when an aspect of the cancellation portion of the notice is challenged, but not when the only objection relates to a retention decision, is perfectly consistent with the pattern discerned in FIFRA.

(d) *Other Considerations*

We also note that this interpretation leaves EDF no worse off than it was before the notice of cancellation. As a matter of fact, EDF is better off. The cancellation of the uses of chlorobenzilate has gone into effect and to that extent EDF is better off than it was before the notice of cancellation issued. Prior to the issuance of the notice any decision not to cancel would have been subject to a district court review under section 16(a), and even now that many of the uses have been cancelled the decision to retain registration for other uses is still subject to district court review. Thus EDF has available to it the same remedies that it did prior to the notice of cancellation, and it is better off for the automatic cancellations of certain uses having gone into effect.

3. *Conclusion as to EDF's Hearing Right*

Because EDF was not adversely affected by the portion of the notice cancelling and restricting chlorobenzilate uses, and because it is not entitled to a hearing respecting only the retention portion, we conclude that the Administrator correctly denied EDF's hearing request.

IV. Timeliness of Florida Citrus's Hearing Request

With respect to the time period in which a hearing request must be made, section 6(b) states:

> The proposed action shall become final and effective at the end of 30 days from receipt by the registrant, or publication, of a notice issued under paragraph (1), whichever occurs later, unless within that time . . . (ii) a request for a hearing is made by a person adversely affected by the notice.[80]

In the notice of cancellation, the EPA outlined the following time limits:

> Registrants affected by the actions initiating cancellation of the registered uses of chlorobenzilate may request a hearing on specific registered uses within 30 days of receipt of this notice, or on or before March 15, 1979, whichever occurs later. Any person adversely affected by the cancellation actions initiated by this notice may request a hearing on specific registered uses affected by this notice on or before March 15, 1979.[81]

Florida Citrus filed a request for a hearing on 20 March 1979. It did not respond directly to the ALJ's order to show cause why its request should not be dismissed as untimely; rather, it filed a motion pursuant to 40 C.F.R. § 164.6(b) to enlarge the time within which to file objections. Believing that section 6(b) required the deadline set in the cancellation notice, the ALJ held he was without power to extend the deadline and consequently the objections of Florida Citrus were dismissed.

On appeal to the Administrator, Florida Citrus argued that section 6(b) allows requests to be filed within thirty days from receipt by *any* registrant or publication of

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[80] 7 U.S.C. § 136d(b) (1976).

[81] 44 Fed. Reg. 9548, 9551 (1979).

the notice, "whichever occurs later." Because Tower Chemical Co., a registrant, did not receive a copy of the cancellation notice until 1 March 1979, Florida Citrus claims the deadline for hearing requests should have been 31 March instead of 15 March. The Administrator rejected the argument. He reasoned it was unlikely that Congress intended that parties be required to discover the dates that *others* received the notice to find out their own deadline. He ruled instead that the deadline for a registrant was thirty days after *it* received a copy of the notice or thirty days after publication in the *Federal Register*; the relevant time period for a nonregistrant was thirty days after publication.

We agree with the EPA's sensible interpretation of the time limitation. The language of the statute is not without ambiguity, but we do not read it to allow adversely affected parties to request a hearing thirty days after either receipt of the notice by *any* registrant or publication. Indeed, section 6(b) speaks of a time period beginning to run from the date of "receipt by *the* registrant" of the notice. Logically, the relevant time period begin to run for a registrant when notice is published and when *it* receives the notice, not when any other registrant receives notice.

Permitting all adversely affected parties, registrants or nonregistrants, to request a section 6(b)(1) hearing anytime until thirty days after receipt of the notice by the very last registrants would lead to great uncertainty as to time limits. For all we know there may still be a notice in the Postal System that hasn't been delivered to a registrant. Interpreting the statutory time limit to be thirty days after the party receives the type of notice required by statute leads to certainty of rights and deadlines. A registrant knows it has thirty days to request a hearing after receipt of actual or constructive notice, to which it is entitled; the nonregistrant knows it has

thirty days from constructive notice, to which it is entitled.[82]

We hold that the Administrator correctly interpreted the time limitations of section 6(b), and affirm his dismissal of Florida Citrus's objection.

V. Conclusion

We conclude that we have jurisdiction to consider this petition and that the Administrator correctly denied EDF's and Florida Citrus's requests for administrative hearing. The decision of the Administrator is

Affirmed.

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[82] Nonregistrants are not statutorily entitled to actual notice of cancellation, so of the two dates on which the thirty days begin to run, only the date of publication has application. To allow nonregistrants to file requests thirty days after any registrant received notice would give nonregistrants an advantage that registrants do not have. It is true that as we interpret section 6(b), registrants have a slight advantage over nonregistrants because they may request a hearing thirty days after *either* actual notice or constructive notice via publication. But these different time limits flow more than anything else from the different kinds of notice rights granted by Congress: registrants receive two kinds of notice, nonregistrants one type. No challenge has been made to the notice provisions legislated by Congress.

APPENDIX B

BEFORE THE ADMINISTRATOR

U.S. Environmental Protection Agency

WASHINGTON, D.C.

FIFRA Docket Nos. 411, et al.

IN RE:

ENVIRONMENTAL DEFENSE FUND, et al.
Petitioners.

Final Decision

This case involves separate appeals by the Environmental Defense Fund ("EDF") and Florida Citrus Mutual from an Accelerated Decision of the Chief Administrative Law Judge (issued May 22, 1979) dismissing their respective objections to a Notice of Intent to Cancel Registrations and Deny Applications for Registration of Pesticide Products Containing Chlorobenzilate.[1] The notice was issued pursuant to §6(b)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended ("FIFRA"), which provides for the issuance of such a notice

> "[i]f it appears to the Administrator that a pesticide or its labeling or other material required to be submitted does not comply with the provisions of this Act or when used in accordance

[1] 44 FR 9548 *et seq.* (February 13, 1979).

> with widespread and commonly recognized practice, generally causes unreasonable adverse effects on the environment. . . ."[2]

The action proposed in the notice becomes final and effective at the end of thirty (30) days from receipt by the registrant, or publication, of the notice, whichever occurs later, unless the registrant makes the necessary corrections (if possible), or a hearing is requested by a person "adversely affected" by the notice. If a hearing is requested, §6(d) of FIFRA provides that

> "such hearing shall be held after due notice for the purpose of receiving evidence relevant and material to the issues raised by the objections filed by the applicant or other interested parties. . . ."

In this case, the notice was issued by the Assistant Administrator for Toxic Substances ("Respondent") pursuant to a delegation of authority. The notice proposed

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[2] The term "unreasonable adverse effects on the environment" is the statutory standard for determining whether a particular use of a pesticide complies with the Act. It is defined in §2(bb) as "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide." In other words, this standard requires that the benefits of each use of a pesticide be balanced against its risks. H.R. Rep. No. 92-511, 92d Cong., 1st Sess. at 14 (House Committee on Agriculture) (hereafter the "House Report"). ("... [T]he Committee seeks to articulate the concept that the benefits of using pesticides should be balanced against the risks of using them."); S. Rep. No. 92-838, 92d Cong., 2d Sess. at 4 (Senate Committee on Agriculture and Forestry) (hereafter the Senate Agriculture Report) ("Pesticides therefore have important environmental effects, both beneficial and deleterious. Their wise control based on a careful balancing of benefit versus risk to determine what is best for man is essential.")

to *unconditionally* cancel the registrations (and deny applications for registration) of chlorobenzilate products for all uses other than citrus uses in Florida, Texas, California and Arizona. With respect to the latter uses, the notice proposed to cancel the registrations (and deny applications for registration) *unless* registrants (and applicants) modified the terms and conditions of registration to reflect specified changes and restrictions. This latter action is referred to as *conditional* cancellation.

Within thirty days of publication of the notice, EDF requested a hearing and filed objections alleging in effect that the conditional cancellation action did not go far enough, that the proposed restrictions were inadequate, and that the citrus uses should have been unconditionally cancelled. Florida Citrus Mutual, an organization representing segments of the citrus industry which use chlorobenzilate, also requested a hearing and filed objections, alleging in effect that the conditional cancellation action went too far in imposing restrictions on the citrus uses; however, the organization's objections and request for a hearing were not filed within thirty days of publication of the notice. No request for a hearing or objections were filed by registrants of chlorobenzilate; however, the principal manufacturer and registrant, Ciba-Geigy Corporation, petitioned for leave to intervene for the limited purpose of opposing the objections filed by EDF on the grounds that they went beyond the scope of the proceeding. The Secretary of Agriculture of the United States also opposed EDF's objections on similar grounds and petitioned for leave to intervene. Both petitions went unopposed and were subsequently granted.

On April 11, 1979, the Chief Administrative Law Judge issued *sua sponte* a Notice to Show Cause why an accelerated decision should not be entered against EDF pursuant to §164.91(a)(6) of the Agency's rules of practice and against Florida Citrus Mutual pursuant to

§164.91(a)(1)[3] of the same rules (40 CFR §164.91(a)). After receiving briefs from the parties and intervenors, the Chief Administrative Law Judge entered his Accelerated Decision dismissing the proceedings and the objections filed by EDF and Florida Citrus Mutual: EDF's objections were improper because the relief it sought was outside the scope of the proceeding and therefore could not be granted; and Florida Citrus Mutual's objections were untimely.

EDF's Appeal

Respondent's decision not to impose a total ban (unconditional cancellation) on the citrus uses of chlorobenzilate was made following a three-year review of the risks and benefits of chlorobenzilate. The review was conducted in accordance with the Agency's Rebuttable Presumption Against Risk (RPAR) regulations (40 CFR §162.11), which, among other things, invited and took into account comments (both oral and written) from interested groups such as EDF in order to assist Respondent in determining whether the statutory standard for issuing a cancellation

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[3] Section 164.91(a) provides, in pertinent part, as follows:

> (a) *General.* The Administrative Law Judge, in his discretion, may at any time render an accelerated decision in favor of Respondent as to all or any portion of the proceeding, including dismissal without further hearing or upon such limited additional evidence such as affidavits as he may receive, under any of the following conditions:
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> (1) Untimely or insufficient objections filed pursuant to §164.20;
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> * * *
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> (6) Failure to state a claim upon which relief can be granted, or direct or collateral estoppel. . . .

notice had been met.[4] Based on that review, he concluded that conditional cancellation for all citrus uses would achieve the statutory mandate of §6(b) that a pesticide not cause "unreasonable adverse effects on the environment." In other words, contrary to EDF's wishes, he refused to impose a total ban (unconditional cancellation) on the citrus uses of chlorobenzilate. It is that refusal which is the undisputed source of EDF's objections. Such a refusal once finalized (after exhausting available administrative remedies), amounts to "final agency action" within the terms of the Administrative Procedure Act (5 U.S.C. §704) and is judicially reviewable under §16 of FIFRA.[5] The issue thus raised by the dismissal of EDF's objections centers on what avenue of administrative relief EDF is entitled to pursue in order to have the requested relief either granted or denied (and thus finalized). Is it by filing objections in the adjudicatory hearing forum established by §6(d) of FIFRA, or is it by invoking the

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[4] The RPAR process, described in the *Shell* decision (discussed *supra* at 6), provides for the "more finely tuned control of pesticides" as envisioned by Congress when it rewrote FIFRA in 1972. *See* Senate Agriculture Report at 5.

[5] Section 16 provides in pertinent part, as follows:

> (a) *District Court Review*—Except as is otherwise provided in this Act, Agency refusals to cancel or suspend registrations or change classifications not following a hearing.... are judicially reviewable in the district courts.
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> (b) *Review by Court of Appeals*—In the case of actual controversy as to the validity of any order issued by the Administrator following a public hearing, any person who will be adversely affected by such order and who had been a party to the proceedings may obtain judicial review by filing in the United States Court of Appeals... a petition praying that the order be set aside in whole or in part....

less formal administrative procedures which have evolved by regulation and practice under FIFRA?

The effect of the Accelerated Decision was to rule that the §6(d) hearing forum is not available to EDF. The Chief Administrative Law Judge reached this result by following the precedent established in a very recent decision of the Judicial Officer in another proceeding (involving a different pesticide) which dismissed objections similar to those voiced by EDF. *In Re: Shell Oil Company, et al.* FIFRA Docket Nos. 401, *et al.*, April 9, 1979 (Decision on Interlocutory Appeal). The applicability of the *Shell* decision to the facts in this case is not disputed by EDF; instead, it argues that the *Shell* decision is erroneous and should therefore be reversed.[6]

In *Shell*, the Judicial Officer reversed an interlocutory ruling of the presiding Administrative Law Judge which allowed Carlos Amaya, *et al.*, representing a coalition of farmworkers, to be heard on objections to a conditional cancellation proposal. Amaya sought to expand the scope of the hearing to include consideration of relief broader (i.e., more restrictive) than that proposed in the §6(b)(1) notice. In allowing Amaya's objections, the presiding officer relied principally on the language in §6(d) which provides that, at the close of the hearing, the Administrator "shall issue an order either cancelling the registration, changing the classification, denying the registration,

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[6] Initially there is the question of whether the *Shell* decision should be reconsidered in view of its undisputed applicability to this case and the fact that no intervening events have occurred to weaken its precedential value. It was rendered by the Judicial Officer pursuant to a delegation of authority from me and therefore has the same authority and finality as if penned under my own name. Nevertheless, upon the Judicial Officer's recommendation, I have decided to rule on the merits of EDF's claims. EDF's suggestions that the *Shell* decision unfairly deprives organizations such as its own of meaningful participation rights in matters raising serious health and environmental questions are not lightly taken and—I presume—not lightly made.

or requiring modification of the labeling or packaging of the article."[7] He concluded that nothing in this language indicates that the Administrator is limited to what has been proposed in the §6(b)(1) notice and that it grants the Administrator broad authority to take any remedial action appropriate to the facts which have been found. The Judicial Officer rejected this analysis on the basis that it usurped the Administrator's authority to define the scope of the proceeding; it ignored the role of the §6(b)(1) notice in setting the framework for the remainder of the proceeding.

> "In procedural terms, the notice serves much the same function as a complaint in any other proceeding, and as such, 'set[s] a standard of relevance which shall govern the proceedings at the hearing.' [Citations omitted.] Thus, matters falling outside the scope of the notice of intent to cancel are of no relevance to the proceeding.

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[7] Section 6(d) provides, in relevant part, as follows:

> (d) *Public Hearings and Scientific Review.*—In the event a hearing is requested pursuant to subsection (b). . ., such hearing shall be held after due notice for the purpose of receiving evidence relevant and material to the issues raised by the objections filed by the applicant or other interested parties . . . . As soon as practicable after completion of the hearing. . ., the Administrator shall evaluate the data and reports before him and issue an order either revoking his notice of intention issued pursuant to this section, or shall issue an order either cancelling the registration, changing the classification, denying the registration, or requiring modification of the labeling or packaging of the article. Such order shall be based only on substantial evidence of record of such hearing and shall set forth detailed findings of fact upon which the order is based.

> Amaya's objections belong in that category to the extent that they are directed at expanding the scope of the hearing to include matters not contained in the notice of intent to cancel. Although the language of Section 6 does not expressly provide that the parties' objections must be relevant to the matters raised in the notice of intent to cancel, such a limitation on the right to file objections is necessarily implied.
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> "The Administrative Law Judge's ruling, on the other hand, allows the parties, by their own objections, to set the standard of relevance for the conduct of the proceeding. This result is contrary to the statutory scheme. Under Section 6(b), the authority to issue a notice of intent to cancel, and hence, set the standard of relevance, is expressly reserved to the Administrator. The Administrator may, of course, delegate that authority to another Agency official, as he did in this case by designating the Assistant Administrator; however, there is no provision in the Act authorizing such notice to be issued by private parties." *Shell* decision at 10-11.

He also noted that limiting the scope of relief to what was contained in the §6(b)(1) conditional cancellation proposal did not preclude Amaya from pursuing other viable avenues of administrative relief in order to persuade the Agency to consider initiating proceedings for the purpose of establishing more stringent restrictions or unconditional cancellation.

The validity of EDF's claim that *Shell* is incorrect as a matter of law is *premised* on its assertion that it is a

person "adversely affected" by the §6(b)(1) notice,[8] a statutory prerequisite to standing to request a hearing and file objections.[9] This assertion was challenged by the

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[8] Exceptions of Environmental Defense Fund to accelerated Decision at 1 June 2, 1979, and *see generally* Brief of Environmental Defense Fund in Support of Exceptions and Appeal from Accelerated Decision, dated June 11, 1979 ("EDF Brief").

[9] Section 6(b) of FIFRA provides:

> "(b) *Cancellation and Change in Classification.*—If it appears to the Administrator that a pesticide or its labeling or other material required to be submitted does not comply with the provisions of this Act or when used in accordance with widespread and commonly recognized practice, generally causes unreasonable adverse effects on the environment, the Administrator may issue a notice of his intent either—
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> "(1) to cancel its registration or to change its classification together with the reasons (including the factual basis for his action, or
>
> "(2) to hold a hearing to determine whether or not its registration should be cancelled or its classification changed.
>
> "Such notice shall be sent to the registrant and made public . . . . *The proposed action shall become final and effective at the end of 30 days from receipt by the registrant, or publication,* of a notice issued under paragraph (1), which ever occurs later, *unless within that time* either (i) the registrant makes the necessary corrections, if possible, or (ii) *a request for hearing is made by a person adversely affected by the notice.* In the event a hearing is held pursuant to such a request or to the Administrator's determination under paragraph (2), a decision pertaining to registration or classification issued after completion of such hearing shall be final.

(footnote continues)

Secretary of Agriculture, Ciba-Geigy and, in particular, by Respondent in his reply brief, where, based upon an analysis of the statute and its legislative history, Respondent argued that a person, such as EDF, whose primary objective is not to *stop* a conditional cancellation proposal from becoming final and effective (but rather is to *force* more restrictive action, such as unconditional cancellation), is not "adversely affected" within the meaning of §6(b) of FIFRA.[10] EDF responds to this argument by contending that Respondent's position is erroneous, that it constitutes a reversal of a long-standing Agency construction of "adversely affected," that it ignores the plain words of §6(b), that it misreads the legislative history, and that it is not defensible as a matter of public policy.[11]

Notwithstanding EDF's arguments to the contrary, I am persuaded that Respondent's reading of FIFRA is correct. The controversy surrounding the meaning of "adversely affected" under §6(b) arises at this late date because, in the past, there has never been any need or occasion to address the issue head-on in an actual controversy. This case and *Shell* number among the first instances in which the Agency has sought to implement

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(footnote continued)

> "In taking any final action under this subsection, the Administrator shall consider restricting a pesticide's use or uses as an alternative to cancellation. . . ." (Emphasis added.)

[10] Respondent's Reply to Exceptions and Appeal by Environmental Defense Fund from Accelerated Decision, dated July 9, 1979 ("Respondent's Brief").

[11] Response of Petitioner Environmental Defense Fund to Respondent's Reply to Petitioner's Appeal from Accelerated Decision, dated July 30, 1979 ("EDF Response").

its authority to issue conditional cancellation notices.[12] Prior to this time the Agency has had to confine itself to issuing unconditional cancellation notices. As a consequence, as was noted by the Chief Administrative Law Judge, EDF has heretofore participated in FIFRA cancellation proceedings as an intervenor, not as a party who is allegedly adversely affected by the cancellation notice.[13]

The "internal logic" of FIFRA is structured so as to confer standing to request hearing and file objections on those persons who want to stop the Agency's proposed action from going into effect. Under §6(b), the proposed action is self-executing: it becomes "final and effective" *unless* the registrant makes the necessary corrections (if possible) or a request for a hearing is made by a person "adversely affected" by the proposed action. EDF obviously has no interest in stopping the proposed action from going into effect, and it is clear that its objections were not filed for that purpose. Rather, EDF's grievance with the proposed action is that the conditional cancellation proposal for the citrus uses did not go far enough; in other words, EDF complains, not of the action proposed, but of the action not proposed. Put still differently, it is the Agency's *refusal* to propose action (unconditional cancellation of the citrus uses) that is the source of EDF's objections. However, FIFRA has never provided for a formal adjudicatory hearing under §6(d) in such circumstances. Instead, it expressly contemplates in §16 that unresolved controversies over Agency "refusals" to propose such action are to be heard in the Federal courts. It is

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[12] The origin of the Agency's authority to issue conditional cancellation notices is discussed in detail in the *Shell* decision (pp. 11-13) and will not be repeated here. EDF does not contest the legality of conditional cancellation, but rather opposes limiting the scope of the proceeding to consideration of conditional cancellation (as opposed to including unconditional cancellation as well).

[13] Acceleration Decision at 5, n. 4 (continued).

clear, therefore, that FIFRA is not structured for the purpose of entertaining objections by persons, such as EDF, who have no real interest in stopping the cancellation proposal from going into effect. If EDF's objections were to be entertained in this proceeding, they would automatically prevent the proposed action from going into effect even though no timely objections were filed by persons such as, registrants and users, who presumptively have a legitimate stake in stopping the proposed action, but who may, nonetheless, for reasons of their own, elect not to oppose it. This anomalous result was pointed out in the Accelerated Decision[14] and would frustrate the statutory scheme for protecting human health and the environment. As Ciba-Geigy observed, "Ironically, EDF would be defeating its own purpose by requesting a hearing. From EDF's viewpoint, some restrictions are surely better than none."[15] Thus, the statutory scheme of FIFRA can not logically support the conclusion that EDF is "adversely affected" by the conditional cancellation proposal. The legislative history of FIFRA and the controlling court decisions are also in accord with this analysis of the statutory scheme.

The legislative history of FIFRA demonstrates that the term "adversely affected" as used in §6(b) only includes registrants, users and other persons who want to stop the proposed cancellation action from going into effect. In *McGill* v. *Environmental Protection Agency*, 593 F.2d 631 (5th Cir. 1979), the court construed this language in the context of deciding whether users of a pesticide who oppose cancellation have the right to prevent the indefinite suspension of a §6(b)(2) hearing when the sole registrant and the Agency have agreed to it. Its analysis

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[14] Accelerated Decision at 4, n. 4.

[15] Response of Intervenor Ciba-Geigy Corporation to Exceptions of Environmental Defense Fund to Accelerated Decision at 13, dated June 21, 1979.

of the legislative history and meaning of the term "adversely affected" is applicable in the context of this controversy as well. The court observed that FIFRA, which was originally enacted in 1947 (the "1947 FIFRA") and which only granted registrants standing to request a hearing,[16] was completely revised in 1972 for the general purpose of expanding the Agency's supervisory role over the use of pesticides and protecting the environment, and in the process of amending the 1947 FIFRA, "Congress also granted specific rights of participation to 'interested' and 'adversely affected' persons (*e.g., non-registrants who are pesticide users*) in ... [§§6(a) and (b) of FIFRA]." 593 F.2d at 635 (emphasis added). The court examined the legislative history and concluded that such rights of participation were added to protect the interests of pesticide users who were not registrants.

> "The legislative history suggests that the rights of non-registrants were recognized in the statute because certain Congressmen were concerned that a pesticide producer would choose

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[16] The procedures for requesting a hearing under the 1947 FIFRA provide, in pertinent part, as follows:

> Whenever the Secretary ... determines that registration of an economic poison [pesticide] should be cancelled, he shall notify ... the registrant of his action and the reasons therefor .... A cancellation of registration shall be effective thirty days after service of the foregoing notice unless within such time the registrant (1) makes the necessary corrections; (2) files a petition requesting that the matter be referred to an advisory committee; or (3) files objections and requests a public hearing. (7 USC 135)

If the matter was referred to an advisory committee and the Secretary thereafter issued an order of cancellation, the registrant (and only the registrant) was given another opportunity to file objections and request a hearing.

not to defend a particular registration that was of small importance to the manufacturer, but of great importance to a particular agricultural group. All parties to this litigation agree that the testimony of Dr. Edwin A. Crosby, a representative of the National Canners Association, was instrumental in securing rights for non-registrants in the revised statute. His proposed amendment was designed to protect the rights of users of established pesticides if the producer-registrant decided not to defend against the cancellation or change of a particular registration. See Hearings on H.R. 10729. Before the Sub-Committee on Agricultural Research and General Legislation of the Senate Committee on Agriculture and Forestry, 92d Cong., 2d Sess. 294 (1972)."[17]

Representatives of the United States Department of Agriculture (USDA) also supported an amendment to §6(b) in order to protect the interests of pesticide users who were not registrants.

> "Such a provision would protect agriculture and other affected persons from the cancellation of a product in instances in which a product has an important use but for any number of reasons

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[17] The amendment which Dr. Crosby referred to in his testimony read:

> "Any person who will be adversely affected by cancellation of a registration or change of classification also may file objections and request a public hearing within 30 days of public notice of the Administrator's intention to cancel the registration or to change the classification of a pesticide."

> the registrant does not wish to appeal; for example, a use involving such a minor volume that the registrant does not find it feasible to appeal."[18]

In response to an inquiry by Senator Allen, the same USDA witness elaborated:

> "What we had in mind is an example of a small group. To use an example, let us take an example of citrus growers in California. I believe that the registration for DDT on citrus was not appealed by the registrant when it was cancelled. The citrus growers therefore had no recourse under the existing law and under the proposed law [i.e., H.R. 10729]. What we would say is that user groups should have the right to appeal on their own behalf and this should not be limited to the registrant. This is our point."[19]

Based on the foregoing testimony and the testimony of Dr. Crosby, the Senate Agriculture and Forestry Committee reported a bill containing an amendment which is virtually identical to the present §6(b).

> "The proposed action shall become final and effective at the end of 30 days from receipt by the registrant, or publication, of a notice issued under paragraph (1), whichever occurs latest, unless within that time either (i) the registrant makes the necessary corrections, if possible, or (ii) a request for a hearing is made by a person adversely affected by the notice."[20]

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[18] Hearings before Subcommittee on Agricultural Research and General Legislation of the Committee on Agriculture and Forestry, U.S. Senate (92nd Cong., 2nd Sess.), on H.R. 10729, Part II, March 7 and 8, 1972, p. 111 ("Senate Hearings").

[19] *Id* at 114-115.

[20] Senate Agriculture Report at 49.

In explaining the amendment, the Senate Agriculture Report demonstrates that the Senate intended the term "adversely affected" to refer to users of the pesticide.

> "The committee action permits persons adversely affected [i.e., registrants] to continue to be able to request review of the status of a registration and adversely affected persons, *like users*, also to participate in the administrative process."[21] (Emphasis added.)

At the same time that users were securing *new rights* of standing from Congress to request hearings and file objections under §6(b), various public interest groups, including EDF, were waging a battle to retain their *established right* of standing to obtain judicial review of Agency refusals to initiate cancellation hearings under §16 (formerly §4(d) under the 1947 FIFRA).[22] Under the 1947 FIFRA, the right of environmental groups to initiate cancellation proceedings by petitioning the Agency (outside the framework of a cancellation hearing) was recognized in *Environmental Defenses Fund* v. *Hardin*, 428 F.2d 1093 (D.C. Cir. 1970). The court held that EDF had standing to seek judicial review of a refusal by the Secretary of Agriculture (who then administered FIFRA) to issue a notice cancelling all uses of DDT.

> "The statute affords a right of review to 'any person who will be adversely affected' by an order (7 U.S.C. 135b (d) (1964) .... The 'zone of interests' sought to be protected by the statute includes not only the economic interest of the registrant but also the interest of the public in safety." 428 F.2d at 1096.

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[21] *Id* at 12.

[22] *See, e.g.*, Senate Hearings at 135 (Sierra Club), 140 (National Audubon Society), 147-150 (Alabama Conservancy) and 168 (Environmental Defense Fund).

As noted by the court, the judicial review provisions of the 1947 FIFRA allowed any person "adversely affected" by an order to seek judicial review. The House of Representatives tried to change this language to "any party at interest,"[23] but the Senate Agriculture Committee "rejected the House language which refers to 'interested persons' so as to avoid any implication of desiring to change present law."[24] Under the "present law" at that time, non-registrants (including users and environmental groups) did not have the right to request an administrative hearing. They could, however, participate in the administrative hearings as intervenors. Consequently, the Senate's restoration of "adversely affected" in the judicial review provisions of FIFRA did not, contrary to EDF's assertions, indicate an intent to grant environmental groups standing to request a hearing for the purpose of contesting an Agency refusal to initiate a cancellation proceeding. EDF glosses over these facts in its selection of excerpts from the legislative history and thus fails to make the proper distinction between standing to intervene in an administrative hearing and standing to obtain judicial review of challenged administrative action.[25] For example, EDF cites the following statement

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[23] House Report at 62.

[24] Senate Agriculture Report at 12.

[25] As noted by Professor Davis in his treatise on administrative law,

> "The problem of right to intervene in administrative proceedings is closely related to and in some measure governed by the elaborate body of law concerning standing to challenge and to enforce administrative action. But intervention and standing to challenge are not the same and are not governed by the same considerations. Intervention is affected by Agency rules and statutory provisions not affecting

(footnote continues)

of David D. Dominick, a former EPA Assistant Administrator, which was made before the Senate Agriculture Subcommittee, as support for its contention that "[e]nvironmental groups such as EDF had standing to request and to participate in cancellation hearings under the 'present law' referred to by the Senate Committee."[26]

> "On a related subject [i.e., EPA's authority to phase-out use of a cancelled pesticide], this matter underscores the importance for broad public participation in our regulatory process. *As the law stands at present, users and interested groups, like environmentalists, have standing to participate in our decisions.* The House Bill has changed the language in the present act. It is our view that this change in language does not create a change in substance in view of the case law which does not suggest that courts view these two phrases differently. While we do not believe a change back to the original FIFRA is required, the Committee may wish to include

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(footnote continued)

standing to challenge. The problems of case or controversy, the heart of many standing problems, do not affect intervention in administrative proceedings. Furthermore, the consequences of intervention are different from the consequences of allowing a party to obtain review. Intervention depends not only upon the directness and importance of the effect of the proceeding upon the interest of the party seeking to intervene, but it also depends upon the effects upon the proceedings of allowing intervention. Thus, an undue broadening of the issues is a common ground for denying intervention." K. Davis, Administrative Law Treatise, §8.11, at 564 (1958).

[26] EDF Brief at 7.

> language in the committee report which would clarify what we believe to be the case."[27] (Emphasis added.)

Mr. Dominick's reference to "standing to participate in our decisions" was obviously intended to refer to standing to participate as an intervenor; only registrants had standing to request a hearing under the 1947 FIFRA. In his prepared comments for the Senate subcommittee hearings, Mr. Dominick addressed this point directly:

> "We agree that any interested person should be able to intervene in a hearing. This is the practice under the present law and that practice is, we believe, carried forward by H.R. 10729 and no further language is necessary. . . ."[28]

Based on this testimony, the Senate Agriculture and Forestry Committee rejected an amendment proposed by the Senate Commerce Committee which would have made such a right to intervene an express part of the law.[29]

Another example of EDF's failure to distinguish between the different types of standing is the following passage in the Senate Agriculture and Forestry Committee's Supplemental Report, which explained that committee's reasons for rejecting a Senate Commerce Committee proposal to include an amendment to provide for citizens' suits:

> "The bill as recommended by the Committee on Agriculture and Forestry affords adversely

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[27] Senate Agriculture Report at 14.

[28] Senate Hearings at 84.

[29] See Senate Agriculture Report (Supplemental) at 42 (October 3, 1972). H.R. 10729 was referred to both Senate committees, but the Committee on Agriculture and Forestry ultimately prevailed in asserting a predominant role in influencing the final legislation.

> affected parties with the opportunity for administrative and judicial review of decisions with respect to registration, cancellation, suspension, classification and the imposition of additional involvement of citizens in the administration of the law provided for by this amendment. * * * The Agriculture Committee bill already *permits any citizen to initiate cancellation proceedings*, obtain judicial review of every action and inaction he disagrees with, and intervene in every proceeding. . . ." (Emphasis supplied in EDF Response at 10).[30]

The underscored language is plainly not "dispositive" of the issue as EDF contends.[31] First, there is no indication in this language that the Senate Agriculture and Forestry Committee intended to rescind its previous statements which equated "adversely affected" persons under §6(b) with registrants and users. Second, the passage simply does not address the issue of whether environmental organizations have standing to request a hearing under §6(b). Third, the right of citizens to "initiate cancellation proceedings" by petitioning the Agency to issue a cancellation notice was established in *Environmental Defense Fund v. Hardin*, and that right is distinctly different from the right to request a hearing after the cancellation notice has been issued. And finally, the express reference in the quoted passage to the right of "any citizen" to "intervene in every proceeding" constitutes tacit recognition of the

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[30] *Id* at 30.

[31] EDF Response at 11.

fact that the Senate expected such persons to participate as intervenors.[32]

Thus, the Senate's restoration of the "adversely affected" language in the judicial review provisions of §16 was intended to avoid any implication of changing the "present law" regarding the right of third parties, such as EDF, to obtain judicial review. That action did not purport to create any new rights of standing for such persons in cancellation hearings under §6(b). However, because the focus of the Senate's deliberations over §16 are heavily identified with rights of environmental groups to obtain judicial review, EDF argues that the identical "adversely affected" language in §6(b) must also have been intended to reflect the same Congressional concern over their rights in cancellation hearings.[33] This argument is too simplistic. It seeks to always equate environmental organizations with the term "adversely affected." However, this ignores the plain meaning of the words: whether one is "adversely affected" depends not so much on his status as a registrant, user or environmentalist, but rather on how he is affected by the proposed action. There must be some legally recognizable injury as a result of the

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[32] In resolving the discrepancy between the House and Senate judicial review provisions, the Committee of Conference similarly stated that §16

> "... provides judicial review of any order following a public hearing for 'any person who will be adversely affected by such order and who had been a party to the proceedings.' It is the intent of the conferees that anyone who intervenes in a public hearing under this Act shall be considered a party for purposes of this provision [i.e. §16(b)]. ... The conferees intend the words 'adversely affected' to have the same meaning that they have under 5 U.S.C. 702." S. Rep. No. 92-1540, 92d Cong., 2d Sess. at 33 (1972).

[33] *See* EDF Response at 8.

proposed action in order for the person to be "adversely affected." As stated in *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972), "a mere 'interest in the problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved'. . . ." Under this definition, EDF is clearly not "adversely affected" by the conditional cancellation proposal; if anything, EDF is benefited, not injured, by the restrictions on the citrus uses. EDF's oversimplification of the relationship between §6(b) and §16 also ignores the legislative history, discussed earlier, which demonstrates that the "adversely affected" language in §6(b) was added to protect the interests of nonregistrants, like users, whose potential for injury is manifest if the proposed action goes into effect.

EDF's real grievance, as stated earlier, is not with the action proposed, but with the action not proposed. FIFRA has never provided for an automatic right to a cancellation hearing in such circumstances. If EDF is unsuccessful in convincing the Agency that its refusal to initiate a cancellation hearing is wrong, EDF's recourse is to convince a Federal court that the Agency's refusal violated the statutory standard under which the Agency is required to issue cancellation notices. Thus, in *Environmental Defense Fund v. Hardin* (after holding that EDF had standing to obtain judicial review of the Secretary's refusal to initiate a cancellation hearing), the court remanded the case to the Secretary of Agriculture for an explanation of the grounds for his refusal. When, after remand, the Secretary affirmed his original decision not to initiate a cancellation hearing, the court held that based upon the Secretary's own findings respecting the hazards of DDT, the statutory standard for issuing cancellation notices had been violated. *Environmental Defense Fund v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971).

> "[W]hen, as in this case, he reaches the conclusion that there is a substantial question about the safety of a registered item, he is obliged to initiate the statutory procedure that results in referring the matter first to a scientific advisory committee and then to a public hearing." 439 F.2d at 595.

Since the Secretary had made a finding about the safety of DDT which met the statutory standard for issuance of a cancellation notice, the court ordered him to issue a cancellation notice and thereby commence the formal administrative process. Consequently, when the opposite finding is made, EDF's recourse to the decision to exclude these uses from unconditional cancellation is the same as it was in 1970. It may petition the Agency to reconsider the refusal to issue an unconditional cancellation notice and, if the petition is subsequently denied, have that decision judicially reviewed as provided in §16 of FIFRA. The law has not changed in this respect, and therefore, contrary to EDF's suggestions, its rights of public participation in pesticide decisions are not narrowed by this result. In fact, EDF, as well as registrants, users and others, were given the opportunity, as part of the RPAR review of this chemical, to participate in the decision which resulted in Respondent's issuance of the chlorobenzilate cancellation notice. The highlights of this review were summarized by Respondent as follows:

> "The Chlorobenzilate Notice was issued after almost three years of intensive review under the RPAR process, which afforded multiple opportunities for interested parties, including EDF, to make their views known to the Agency. Parties were invited to submit comments in response to the initial RPAR Notice (41 FR 21517; May 26, 1976); were allowed to make written and oral presentations to the Agency's FIFRA Scientific

> Advisory Panel; and were invited to submit comments on the Agency's preliminary decisions concerning the balancing of risks and benefits of Chlorobenzilate which were announced in a Notice of Determination Concluding the Chlorobenzilate RPAR, and which were explained in detail in an accompanying Position Document (43 FR 29824; July 11, 1978). Moreover, the Agency responded in detail to the last set of comments on the Agency's evaluation of risks, benefits and chosen regulatory options in another Position Document which accompanied the final Chlorobenzilate Notice (44 FR 9548; February 13, 1979). Following this sequence of events, the Administrator's delegatee for these decisions (Respondent Assistant Administrator for Toxic Substances) has taken an action that he has determined will achieve the statutory mandate that a pesticide not cause unreasonable adverse effects on the environment, and has issued a §6(b)(1) notice to effectuate that decision." (Respondent's Brief at 28-29.)

Thus, public participation in pesticide decisions is actually broadened in contrast to earlier times when decisions on cancellation matters were not made public until a cancellation notice was actually issued. At the same time, the RPAR process implements the spirit of the Congressional mandate that FIFRA provide for "more finely tuned control of pesticides."[35] (This latter point is discussed at length in the *Shell* decision.) Yet, in spite of these parallel achievements, EDF is urging an interpretation of FIFRA which it openly acknowledges will cause the environmentally protective restrictions contained in the conditional cancellation proposal to be "stayed pending the outcome of

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[35] Note 4, *supra*.

the hearing."[36] Such an interpretation simply does not make any sense and is contrary to the statutory scheme as discussed above.

EDF raises a number of other arguments in its briefs which are primarily intended to support its contention that the *Shell* decision is erroneous. For example, in arguing that the Agency has broad authority under FIFRA to enlarge the scope of relief beyond what is proposed in the notice of intent to cancel, EDF suggests that the due process problems with respect to the registrant who elects not to oppose the proposed action (and thereby allows his registration to be cancelled by operation of law) can be ignored since the registrant was on notice during the RPAR review that unconditional cancellation was an option open to the Administrator and "it is in this context that the registrant was advised of EDF's objections to the Administrator's proposal."[37] The practical effect of this suggestion is to nullify the purpose of the notice itself, which is to inform the registrant of what action the Agency intends to take (5 U.S.C. 554(b)), not what action EDF intends to take. It is also based on the unlikely assumption that the registrant has the prescience required to know what EDF's position will be after the cancellation notice is issued, based upon the position it took during the RPAR review. EDF also argues that the scope of relief is not limited to what was proposed in the notice by relying on court decisions arising in the context of rulemaking proceedings;[38] however, these decisions are inapposite to license revocation proceedings (cancellation) conducted in accordance with FIFRA and the Administrative Procedure Act. These and all other arguments made by EDF have been considered and rejected as either being irrelevant or lacking in merit; in any event, they are not sufficient to overcome the conclusion that EDF is

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[36] EDF Response at 25.

[37] *See* EDF Response at 22 and Appendix C at 8.

[38] EDF Response, Appendix C at 11.

not "adversely affected" by the conditional cancellation notice within the meaning of §6(b).

Florida Citrus Mutual's Appeal

The issue in this appeal is whether Florida Citrus Mutual filed a timely request for a hearing in connection with the chlorobenzilate notice.[39] The chlorobenzilate notice, issued on February 5, 1979, was published in the *Federal Register* on February 13, 1979, and specified the time for requesting a hearing as follows:

> "Registrants affected by the actions initiating cancellation of the registered uses of chlorobenzilate may request a hearing on specific registered uses within 30 days of receipt of this notice, or on or before March 15, 1979, whichever occurs later. Any person adversely affected by the cancellation actions initiated by this notice may request a hearing on specific registered uses affected by this notice on or before March 15, 1979." 44 F.R. at 9551.

Florida Citrus Mutual's request was not filed with the Hearing Clerk until March 20, 1979, five (5) days after the deadline set forth in the notice. Accordingly, the Chief Administrative Law Judge issued a notice to show cause why the request for a hearing should not be dismissed as untimely. Rather than respond directly to the notice to show cause, and in apparent recognition of the untimeliness of its request, Florida Citrus Mutual filed a motion pursuant to 40 CFR 164.6(b) to enlarge the time within which to file its objections. As grounds for granting the extension, Florida Citrus Mutual stated that it did not receive the *Federal Register* notice until March 2, 1979,

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[39] Florida Citrus Mutual is not a registrant, but its status as "a person adversely affected" by the notice is not contested by any party.

and it "understood" that it had 30 days from that date to file its request for a hearing.

In denying the motion and dismissing the request for a hearing, the Chief Administrative Law Judge did not comment on the organization's obvious misreading of the notice, but instead held that the Agency's rules of practice did not allow him to enlarge the 30-day statutory deadline. On appeal, Florida Citrus Mutual does not contest the Chief Administrative Law Judge's conclusion that the Agency's rules of practice do not allow for the enlargement of a statutory deadline; instead, it asserts that Respondent's notice of intent to cancel misinterprets the statutory requirements and thus had the unlawful effect of shortening the 30 day deadline. In other words, Florida Citrus Mutual argues that the March 15 deadline specified in the notice conflicts with §6(b), which, in pertinent part, is restated here as follows:

> "The proposed action shall become final and effective at the end of 30 days from receipt by the registrant, or publication, of a notice issued under paragraph (1), whichever occurs later, unless within that time either (i) the registrant makes the necessary corrections, if possible, or (ii) a request for a hearing is made by a person adversely affected by the notice."

The thrust of Florida Citrus Mutual's argument is that this language should be interpreted to allow the timeliness of a non-registrant's request for a hearing to be measured from either (i) 30 days following the date of publication of the notice in the *Federal Register* or (ii) 30 days following *any* registrant's receipt of the notice, whichever occurs later. It argues that the interpretation contained in Respondent's notice favors registrants and unfairly penalizes non-registrants: non-registrants must always measure the timeliness of their requests by reference to the publication date, whereas registrants have the

option of measuring it from either the date of receipt or the date of publication, whichever occurs later. However, Florida Citrus Mutual fails to note that its interpretation has the opposite effect: if just one registrant receives his notice *after* it was published in the *Federal Register*, the 30-day period following the publication date may be ignored by *all* non-registrants, notwithstanding the fact that other registrants who received their notices on or before the publication date must abide by that date or suffer the consequences of having their registrations cancelled by operation of law. Consequently, neither interpretation offers complete parity under all circumstances. The only instance where both achieve it is when all registrants receive their copies of the notice on the same day that the notice is published. The likelihood of this occurring, even under the best of circumstances, is of course extremely remote. Thus, in the absence of any indication to the contrary in the legislative history, it is reasonable to assume that Congress did not expect this provision of FIFRA to operate in a way that would require registrants and non-registrants to be treated equally. Some inequality was bound to occur.[10]

As noted in connection with EDF's appeal, the 1947 FIFRA did not authorize non-registrants to request a hearing. In addition, there was no provision for publication of the notice; it was simply sent to the registrant, who then had 30 days after service thereof to file a request for

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[10] Actually there is a third interpretation which does achieve parity between the two categories. It is based on the assumption that the notice provisions of §6(b) permit a registrant who allowed both periods to lapse before requesting a hearing (i.e., 30 days from actual receipt, and 30 days from publication) to later come in and have his untimely request ruled "timely" by virtue of the fact that it was nevertheless filed before the expiration of some other registrant's deadline (regardless of whether or not the latter actually filed a request). However, this interpretation is so obviously at odds with common sense that it must be dismissed as being totally implausible.

a hearing.[41] However, with the 1972 amendments to FIFRA which expanded the right to request a hearing to include non-registrants who are adversely affected by the notice, an obvious need arose to provide some means of notifying them that the proposed action would become final and effective unless they made a timely request for a hearing. Since the number of individuals who fall in that class is not known and their identities are not readily ascertainable, publication in the *Federal Register* was clearly the only feasible way of putting them on notice that their interests might be adversely affected by the Agency's proposed action. Therefore, it is reasonable to infer that the publication provision in §6(b) was primarily intended to prescribe a deadline for non-registrants. The fact that it might also benefit registrants must be viewed as incidental. Constructive notice through publication in the *Federal Register* is not normally regarded as a satisfactory substitute for actual notice when the identity and location of the affected person is known or readily ascertainable, as is the case with registrants. Constructive notice by publication in the *Federal Register* is, however, normally regarded as adequate when the identity and location of the affected person is not known or readily ascertainable, as is the case with non-registrants who are adversely affected by the notice. Therefore, it is unlikely that Congress intended to put non-registrants, such as Florida Citrus Mutual, on the same footing as registrants in terms of defining when their rights to request a hearing would be cut-off by the passage of time. Non-registrants were given the right to request a hearing as a matter of legislative grace in order to ensure that the interests of farmers and other consumers would be considered before a pesticide's availability was restricted or terminated, not because they were entitled to a hearing as a matter of law. *Cf. McGill* v. *Environmental Defense Fund, supra* at 637.

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[41] *See* note 16, *supra*.

It is unreasonable to assume that Congress intended to grant a grace period to non-registrants (in order to cure a lack of due diligence in responding to the published notice) which has the cloudy contours envisaged in the interpretation advanced by Florida Citrus Mutual. In order for Florida Citrus Mutual to establish that its request was timely under its interpretation, Florida Citrus Mutual was forced into the position of attempting to locate a registrant who had not received a copy of the notice until after the publication date. Based on that search, it uncovered a registrant, Tower Chemical Company of Clermont, Florida, which did not receive a copy of the notice until March 1, 1979. Therefore, according to Florida Citrus Mutual, it had 30 days from the receipt of Tower Chemical Company's notice, or until March 31, 1979, to file its request for a hearing. Notwithstanding Florida Citrus Mutual's ingenuity and success in locating Tower Chemical Company, it is unlikely that Congress intended §6(b) to operate in this way. It seems more likely that it intended a more objective and easily ascertainable method of judging the timeliness of non-registrants' hearing request. By referencing the timeliness of such requests to the date of publication in the *Federal Register*, Respondent established such a method.

Conclusion

The Accelerated Decision of the Chief Administrative Law Judge is affirmed in its entirety.

DOUGLAS M. COSTLE

Douglas M. Costle
Administrator

Dated: August 20, 1979